Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DONALD EDWARDS,

Petitioner

Versus

STATE OF LOUISIANA

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

I. Do the constitutional safeguards provided by the Fourth, Fifth and Sixth Amendments of the United States Constitution, applicable to the states through the Fourteenth Amendment, give to a defendant the right to inquire into the details and information which will determine whether or not probable cause existed for a warrantless arrest?

II. Do the protective warnings mandated by the Fourth, Fifth and Sixth Amendments set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966) require that the warnings precede any interrogation; is the accused entitled to be put on notice as to the exact charges for which he has been arrested and to have the rights afforded him defined prior to any custodial detention and interrogation?

III. Were the constitutional guidelines as set forth in *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975) and *Dunaway v. State of New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979) compiled with in allowing the admission into evidence of the defendant-appellant's taped statement?

IV. Does the Trial Judge's refusal to allow admissions into evidence on the question of the defendant-appellant's capacity to stand trial and assist counsel in his defense amount to a denial of due process of law; is the accused constitutionally entitled to a hearing dispositive of the issue of his competence?

V. Did the Trial Judge's denial of the defendant's motion to conduct pre-trial hearings in camera prejudice defendant-appellant's constitutional right to a fair trial?

TABLE OF CONTENTS

Page

Questions Presented i

The Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions Involved 3

Louisiana Statutes and Code Articles Involved 5

Statement of the Case 7

Reason I for Allowance of Writ 10

Reason II for Allowance of Writ 15

Reason III for Allowance of Writ 18

Reason IV for Allowance of Writ 22

Reason V for Allowance of Writ 25

Conclusion 27

Appendix A A-1

Appendix B B-1

Appendix C C-1

TABLE OF AUTHORITIES

Case Law

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964) 13, 14

Brinegar v. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S. Ct. 1302 (1949) 22

Brown v. Illinois, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S. Ct. 2254 (1975) 10, 18, 19, 21, 22

Davis v. Mississippi, 394 U.S. 721, 22 L.Ed. 2676, 89 S. Ct. 1394 (1969) 19, 21

Drope v. Missouri, 420 U.S. 162, 43 L.Ed. 2d 103, 95 S. Ct. 896 (1975) 22, 23

Dunaway v. State of New York, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S. Ct. 2248 (1979) 10, 18, 21, 22

Dusky v. United States, 362 U.S. 402, 4 L.Ed. 2d 824, 80 S. Ct. 788 23

Feeley v. District of Columbia, 387 F. 2d 216 (D.C. 1967) ..15

Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed. 2d 152, 92 S. Ct. 1620 (1972) 20

Mapp v. Ohio, 367 U.S. 648, 6 L.Ed. 2d 1081, 81 S. Ct. 1684 19

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966) 15, 17, 18

Nebraska Press Association v. Stewart, 427 U.S. 539, 49 L.Ed. 2d 683, 96 S. Ct. 2791 (1976) 27

Pate v. Robinson, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S. Ct. 836 (1966) 23

Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed. 2d 663, 83 S. Ct. 1417 (1963) 26

Rovario v. United States of America, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S. Ct. 623 (1957) 14

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 51 L.Ed. 2d 637 (1969) 13, 14

State v. Green, 263 La. 837, 269 So.2d 460 (1972) 16

State v. Scott, 355 So.2d 231 (La. 1978) 10

Thomas v. Cunningham, 313 F.2d 934 (CA 4 1963) 23

United States v. Hamilton, 490 F.2d 58 (9th Cir. 1974) ...13

Washington Mobilization Committee v. Cullinane, 400 F. Supp. 186 (D.C. 1975) 15

Westover v. United States, 384 U.S. 436, 16 L.Ed.2d 694, 86 S. Ct. 1602 (1966) 20

Wong Sun v. United States, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1963) 18, 19, 20

Youtsey v. United States, 97 F. 937 (CA 6 1899) 22

Constitutional Provisions

United States Constitution

Fourth Amendment 3, 10, 15, 19, 20, 21, 22

Fifth Amendment 3, 10, 15, 19, 21, 22

Sixth Amendment 3, 10, 15

Fourteenth Amendment 4, 10

Louisiana Constitution

Article I, Section 2 4

Article I, Section 13 .....4, 15

Article I, Section 16 .....4, 27

Louisiana Revised Statutes and Code Articles

LSA-R.S. 15:451 5

LSA-R.S. 15:452 5

LSA-C.Cr.P. Article 213 .....5, 11

LSA-C.Cr.P. Article 622 6

LSA-C.Cr.P. Article 641 6

LSA-C.Cr.P. Article 642 .....6, 23

LSA-C.Cr.P. Article 646 6

LSA C.Cr.P. Article 648 7

LSA-C.Cr.P. Article 703(c) 7

Encyclopedic References and Articles

76 ALR 2d 338, Section 34 14

4 W. Blackstone Commentaries 22

Foote, A Comment on Pre-Trial Commitment of Criminal Defendants 108 U. Pa. L. Rev. 832 (1960) 23

American Bar Association Standards For Criminal Justice, Section 3.1 25

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OPINIONS BELOW

The petitioner, Donald Edwards, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Louisiana affirming the appellant's conviction in Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. The ruling affirming appellant's conviction was entered on November 16, 1981 and the petition for rehearing was denied December 14, 1981.

The written opinion of the Supreme Court of the State of Louisiana, at 406 So.2d 1331 (La. 1981), being case number

64,204 on the docket of that Court, a copy of which opinion appears herein as Appendix A. The Supreme Court of Louisiana denied the application for rehearing without opinion, a copy of the notice of denial appears herein as Appendix B. Attached is Appendix C, which is a prior opinion questioning the admissability of the statements made by petitioner, dated October 8, 1979, at 375 So.2d 1365 (La. 1979).

JURISDICTION

This is a criminal prosecution brought against the defendant-appellant, Donald Edwards, under which appellant was charged and convicted in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana of first degree murder in violation of Louisiana Revised Statutes, Section 14:30, and was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

Initially, appellant appealed to the Supreme Court of Louisiana; the Court found that a substantial issue was presented during the pre-trial proceedings, specifically on the Motion to Suppress appellant's alleged confession. The Court remanded the case to the District Court to re-open the hearing on the Motion to Suppress, a copy of this opinion issued October 8, 1979 is attached as Appendix C.

Subsequent to remand, this appeal was reinstated. The judgment sought to be reviewed is the ruling of the Supreme Court of Louisiana finally affirming appellant's conviction issued November 16, 1981; the petition for rehearing was denied on December 14, 1981, all as more fully shown by appendices A, B and C hereto annexed. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. §1257(3). The federal questions are substantial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV, Section 1

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Constitution of 1974, Article I, Section 2

"No person shall be deprived of life, liberty or property, except by due process of law."

Louisiana Constitution of 1974, Article I, Section 13

"When any person has been *arrested or detained* in connection with the investigation or commission of any offense, he *shall be advised fully of the reason for his arrest or detention,* his right to remain silent, his right against self incrimination, his right to the assistance of counsel, and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the *nature and cause of the accusation against him.* At *each stage of the proceedings,* every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents. (Emphasis supplied).

Louisiana Constitution of 1974, Article I, Section 16

"Every person charged with a crime is presumed innocent until proven guilty and is entitled to a

speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify on his own behalf."

Louisiana Statutes and Code Articles Involved

Louisiana Revised Statutes, Section 15:451

"Before what purposes (sic) to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

Louisiana Revised Statutes, Section 15:452

"No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime."

Louisiana Code of Criminal Procedure, Article 213

"A peace officer may, without a warrant, arrest a person when:

(1) The person to be arrested has committed an offense in his presence; and if the arrest is for a misdemeanor it must be made immediately or in close pursuit;

(2) The person to be arrested has commited a felony, although not in the presence of the officer;

(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer; or

(4) The peace officer has received positive and

reliable information that another peace officer holds a warrant for the arrest.

A peace officer in close pursuit of a person to be arrested, who is making an arrest pursuant to this article may enter another jurisdiction in this state and make the arrest."

Louisiana Code of Criminal Procedure, Article 622

"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending. In deciding whether to grant a change of venue, the Court shall consider whether the prejudice, the influence, or the other reasons are such that will affect the answers of jurors on the voir dire examination or the testimony of witness at the trial."

Louisiana Code of Criminal Procedure, Article 641

"Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense."

Louisiana Code of Criminal Procedure, Article 642

"The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have mental capacity to proceed."

Louisiana Code of Criminal Procedure, Article 646

"The court order for a mental examination shall not deprive the defendant or the district attorney of

the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination."

Louisiana Code of Criminal Procedure, Article 648, Section A, in pertinent part:

A. "The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks the mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the proper State Mental Institution or a private institution approved by the court, for custody, care and treatment for as long as the lack of capacity continues . . . . * * *"

Louisiana Code of Criminal Procedure, Article 703, Section C:

C. "On the trial of a motion to suppress filed under the provisions of this article, the burden of proof is on the defendant to prove the grounds of his motion, except that the State shall have the burden of proving that a purported written confession or written inculpatory statement was made freely and voluntarily and was not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

STATEMENT OF THE CASE

On the evening of January 17, 1978, Officers Odom and Bourgeois of the Baton Rouge City Police Department, on routine patrol, spotted three black males in a yellow Rambler outside of a convenience store in the City of Baton Rouge, State of Louisiana. Because of their suspicious behavior, the Officers noted the subjects, watched their departure from the scene, abandoning the subject vehicle. The officers then

investigated and ascertained that the vehicle belonged to one Ruth McInnis Todd.

The Officers proceeded to the home of Mrs. Todd whereupon they discovered that her house had been burglarized and Mrs. Todd, had been stabbed to death. Upon investigation, the three suspects earlier spotted were arrested. The suspects underwent interrogation; fingernail clippings and samples of their clothing were tested and found to bear traces of human blood. The suspects were charged with the robbery and murder and then some three days later released.

Approximately a week later, after numerous interrogations of young blacks living in the vicinity and based upon information received from "informants", three new suspects were arrested without warrants for the murder of Mrs. Todd, one being defendant-appellant, Donald Edwards. The three were subsequently indicted on February 1, 1978 by Grand Jury Indictment for the first degree murder of Ruth McInnis Todd.

Federal questions, concerning the admissability of statements made by defendant, were raised prior to trial by motion to suppress filed on March 1, 1978 (cited in Paragraph IV thereof) and supplemented by leave of Court on March 16, 1978 (Paragraphs VI A and VI B thereof). This motion as supplemented, was denied by the Trial Court after a hearing occurring on May 3rd and 4th, 1978.

According to booking records, defendant-appellant, Donald Edwards, was arrested at approximately 3:15 P.M. on January 23, 1978; however at the pre-trial hearing on the motion to suppress a statement given by the defendant a short time subsequent to arrest, the arresting officers asserted that the arrest took place at 5:00 P.M. that same date.

Though the police officers testimony was somewhat modified later at the trial which commenced September 5th, 1978, the inconsistent testimony as well as the unsubstantiated assertions by the officers that statements of the other two suspects provided cause to arrest defendant-appellant in addition to the tips provided by the informers presented a clear question as to existence of probable cause for the arrest.

Prior to trial on the merits, a Sanity Commission was appointed to determine the existence of mental disease or defect affecting defendant-appellant's capacity to understand the proceedings and to assist counsel in his defense. The Sanity Commission, consisting of Dr. Hypolite Landry, Coroner for the Parish of East Baton Rouge, and Dr. Frank Silva, recommended in general that further diagnostic evaluation be conducted because of their inability to communicate with this defendant.

The Trial Judge however held the defendant competent to stand trial. The defendant then moved the court to reopen the question of competence to stand trial or assist counsel. The Trial Judge thereafter denied defendant the right to put on further evidence of incapacity. See May 4 and 5, hearing, page 3-8. See also sentencing hearing, testimony of Fred Tuton, commencing page 44, motion for mistrial, page 64-71.

Subsequent to trial by jury, defendant-appellant was found guilty of first degree murder. Thereafter a sentencing hearing was conducted September 13, 1978. Again, defendant-appellant attempted to introduce evidence concerning his lack of capacity out of the presence of the jury, but the Trial Judge denied him that right. By recommendation of the jury, the defendant was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

An appeal was timely directed to the Louisiana Supreme Court citing thirty specifications of error. The court in its per curiam opinion issued October 8, 1979 held that a substantial issue had been presented by defendant's motion to suppress his confession. The Louisiana Supreme Court remanded the matter directing the Trial Court to reopen the hearing on the motion to suppress to receive at the reopened hearing evidence as to probable cause for the arrest of the accused consistent with the holdings of *Dunaway v. New York*, 442 U. S. 200, 60 L.Ed 2d 824, 99 S. Ct. 2248 (1979); *Brown v. Illinois*, 422 U. S. 590, 45 L.Ed 2d 416, 95 S. Ct. 2254 (1975); and *State v. Scott*, 355 So.2d 231 (La. 1978).

On remand, the Trial Court by direction of the Louisiana Supreme Court, conducted the hearing, but again refused to allow an indepth inquiry into the veracity of the alleged informers whose information purportedly formed the basis of the probable cause for defendant-appellant's arrest, holding the confession admissible and affirming the conviction.

On appeal following remand, the Louisiana Supreme Court in its opinion issued November 16, 1981 affirmed defendant-appellant's conviction. Thereafter defendant applied for a rehearing but such was denied December 14, 1981. Defendant now timely seeks the attention of this Honorable Court to the questions herein presented.

REASONS FOR ALLOWANCE OF THE WRIT

I. Do the constitutional safeguards provided by the Fourth, Fifth and Sixth Amendments, applicable to the States through the due process clause of the Fourteenth Amendment give to a defendant the right to inquire into the details and information which will determine whether or not probable cause existed for a warrantless arrest?

In Louisiana, an individual may only be arrested without a warrant, under specific, enumerated situations, one of which is where the peace officer has "reasonable cause" or probable cause to believe that the person to be arrested committed an offense, although not in the presence of the officer. Louisiana Code of Criminal Procedure, Article 213.

In this cause defendant-appellant was arrested without a warrant, within a short time giving a taped inculpatory statement. During the pre-trial hearings, the trial and the subsequent reopened hearing on remand, it became clear that if any basis had existed for defendant's arrest it rested either upon information obtained from confidential informants or a statement given by a co-defendant, Norman Kent. Prior to trial the State asserted that a statement by a co-conspirator, Kent, purportedly served as the basis for Edward's arrest.

However, knowing that booking records would be produced at trial, the testimony changed. For example, an excerpt from the pre-trial hearing on the motion to suppress in May, 1978 showed Sergeant Breaux to have testified as follows at (T.21):

Sergeant Breaux testified (page 21):

"Q. Can you tell me the approximate hour and location that you made the arrest on the Edwards' individual?

A. This was approximately five o'clock in the afternoon as best as I can recall.

Q. All right and do you recall where you picked him up?

A. At his residence."

Officer Sid Lasoyne testified (page 57):

"Q. Officer Lasoyne, Edwards was arrested at three fifteen that afternoon; is that correct?

A. No.

Q. Do you recall when he was arrested?

A. Somewhere around 5:00."

However, by the trial in September, 1978, the testimony changed. Officer Breaux then testified (Volume III, page 201):

"Q. Do you recall the approximate hour that you took Mr. Edwards into custody, what time of day was it?

A. If I'm not mistaken, it was around three o'clock if I recollect, somewhere in the area of three o'clock."

Officer Lasoyne testified (Volume III, page 223):

"Q. And so from 3:15 til 5:00, Donald Edwards was somewhere in Police custody; is that right?

A. That's correct."

The end result was that the booking records conclusively established that the arrests of the defendant-appellant and his co-defendant were in close proximity in time and that Kent's statements could not have contributed to the arrest of Edwards, contrary to prior assertions. See the dissenting opinion of Justice Dixon in Appendix C.

Upon the demise of Kent as the focal point of the basis of Edward's arrest, the State asserted that the confidential

informants provided sufficient cause for the arrest. The State placed much weight upon one Michael Hatch disclosed as an informant at the remand hearing, March 7 and 11th, 1980, as one who provided information. However Hatch at the hearing conducted in May, 1981 gave testimony which would eliminate any doubt that he provided substantial information leading to Edward's arrest, testifying at p. 160.

"Q. Were you ever contacted by any police officers in the investigation of that case?

A. No sir."

At Page 161:

"Q. Do you remember what day it was you were arrested?

A. The same day Kent was picked up."

It thus became apparent that the basis must rest upon the "confidential" informer whose identity the State refused to disclose and who the State refused to produce. Under *Aquilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969) for an informer's tip to provide grounds for a finding of probable cause, law enforcement officers must establish both the reliability of the informant as well as the reasons for trusting the conclusions made by the reliable informant. *United States v. Hamilton*, 490 F.2d 598 600 (9th Cir. 1974).

Faced with an undisclosed informant who allegedly provided grounds for a warrantless arrest, it is submitted that defendant was entitled to the disclosure to discover the underlying circumstances which made his or her information justify

the arrest. This Court in *Rovario v. United States of America*, 353 U. S. 53, 1 L.Ed. 2d 639, 77 S. Ct. 623 (1957) addressed the issue of confidential informers and privileged communications. The court held that the privilege, the purpose of which is the protection of the public interest, is nevertheless limited in its applications, particularly finding as follows:

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful *to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . . * * *"

With respect to the particular situation in which the privilege communication is relied upon to establish probable cause for arrest, the rule is well stated in Section 34, 76 ALR 2d 338:

> "As regards the issue of the legality of an arrest or search without warrant, the privilege of nondisclosure does not apply, and the identity of an informer must be disclosed, *where there is no showing of probable (reasonable) cause apart from the informer's communication.* (Emphasis supplied)"

The State however failed to affirmatively meet the standards set by *Aquilar* and *Spinelli*; no basis was properly laid which would warrant a finding of probable cause upon only assertions of a police officer when such testimony was already questionable as to accuracy. The issue presented herein however is the action of the Trial Judge who by his refusal to allow defendant-appellant the disclosure sought, which was requested to be in an in camera hearing, effectively denied defendant his only opportunity to conclusively prove that no probable cause for his arrest existed; that in fact, as he as-

serts, the police were still only in the investigatory stage, selecting and discarding possible suspects. Defendant-appellant was clearly prejudiced by the action of the court; his constitutionally afforded right to require that it be shown that his warrantless arrest was properly premised upon probable cause effectively short circuited. Without probable cause, the arrest is deemed illegal and the statements obtained thereby become tainted under the "fruit of the poisonous tree" doctrine. Obviously by the action of the Trial Court an essential threshold determination is denied; a clear intrusion into defendant-appellant's right to due process.

II. Do the protective warnings mandated by the Fourth, Fifth and Sixth Amendments as enunciated in *Miranda v. Arizona*, 384 U. S. 436, 16 L.Ed. 2d 694, 85 S. Ct. 1602 (1966) require that the warnings precede any interrogation? Is the accused entitled to be put on notice as to the exact charges for which he has been arrested and to have the rights afforded him defined prior to any custodial detention and interrogation?

The Sixth Amendment to the United States Constitution requires that the accused be informed of the nature and cause of the accusation; the Constitution of the State of Louisiana, Section 13 of Article I specifically requires that when any person has been arrested or detained in connection with the investigation of commission of any offense, he shall be *advised fully* of the reason for his arrest or detention. The right to be fully informed of what crime he is being arrested for is compelled by both the United States and Louisiana Constitutions. *Feeley v. District of Columbia*, 387 F.2d 216 (D.C. 1967); *Washington Mobilization Committee v. Cullinane*, 400 F.Supp. 186 (D.C. 1975).

In the present case, defendant-appellant was never in-

formed, at any point prior to giving his statement, that he was being charged with murder. He, and both of his parents, testified that they *were* told at the time of his arrest that he was being arrested for a burglary and "purse-snatching". His father testified that he first learned that his son was being arrested for a murder from a television newscast. The testimony of the arresting for a murder from a television newscast. The testimony of the arresting officers buttresses the testimony of the defendant and his parents. That testimony was as follows:

By Officer Gardiner: (May, 1978, page 142):

"Q. Did you on that occasion inform them that you were investigating a burglary?

A. Yes, burglaries and other offenses, if I remember correctly.

Q. Burglaries that you're referring to would have been in connection with the Todd case; is that correct?

A. That's correct."

Testimony of Officer Crouch (May 1978, page 134):

"Q. Now, at the time that you secured her permission, can you tell me what you would have told her about the charges against her son?

A. At the time we talked to her, we referred to Burglary and I don't recall whether we informed her of the possible homicide."

While it would seem less offensive for an accused not to be informed of lesser or included crimes (See *State v. Green*, 263 La. 837, 269 So.2d 460, La. 1972), the opposite, not being

informed *fully* of higher crimes, is more than merely offensive; it is forbidden, by both Constitutions. Even more, where the crime unknown to the accused is murder, the care and precaution required in insuring the rights of the accused should come under the highest degree of scrutiny. In the present case, the record indicates that defendant-appellant did not learn the real nature of his arrest until initial interrogation, just prior to the taped statement.

It was also at the time of the taped statement when the accused was first informed of his "Miranda rights".
This Court in *Miranda* summarized its holdings at 384 U. S. 439, 479 as follows:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial,

> no evidence obtained as a result of interrogation can be used against him."

The accused is entitled to these warnings prior to the beginning of any custodial interrogation. This Court in *Miranda* continued at 86 S. Ct. 1612:

> "* * * While there is evidence which supports the judge's observation, we do not think it is the number of warnings that controls but rather the time they are given by the investigating officers. In other words, it was required that appellant be advised of his constitutional rights at the time the investigation of Mrs. Millien's death ceased to be exploratory in nature, i.e., when the officers focused their attention on appellant as the guilty party in a homicide and sought to secure inculpatory statements from him. For the protective procedures erected in the Miranda case, as we understand it, make it obligatory for the officers to inform an accused of his privilege to remain silent and of his right to counsel when the individual is first subjected to interrogation while in custody at the police station, * * * *or otherwise deprived of his freedom of action in any significant way.*" (Emphasis added)

The actions of the law enforcement officials effectively denied to defendant-appellant his constitutional right to be fully informed of the crime for which he was being arrested.

III. Were the constitutional guidelines as set forth in *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S. Ct. 2254 (1975) and *Dunaway v. State of New York*, 422 U. S. 200, 60 L.Ed. 2d 824, 99 S. Ct. 2248 (1979) complied with by allowing the admission into evidence of the defendant-appellant's statement?

The exclusionary rule established by this Court in *Wong*

Sun v. United States, 371 U. S. 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1963) enunciating principles to be applied where the issue is whether statements obtained after an illegal arrest should be excluded from evidence was primarily directed to protect Fourth Amendment rights in deterring lawless conduct by law enforcement officials and denying use of evidence unconstitutionally obtained. In *Brown v. Illinois*, supra this Court affirmed the "intimate" relation of the Fifth Amendment safeguards to those of the Fourth Amendment but recognized that *Miranda* warnings per se have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Thus even if the warnings suffice for the protection afforded under the Fifth Amendment, they still in no way inform a person of his Fourth Amendment right to be released from unlawful custody following an arrest made without a warrant or without probable cause. *Brown v. Illinois*, supra at 45 L.Ed. 2d 426. This Court in *Brown* declared at page 426:

> "If Miranda warnings, by themselves were held to attentuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See Davis v. Mississippi, 394 U.S. 721, 726-727, 22 L.Ed. 2d 676, 89 S. Ct. 1394 (1969). Arrest made without warrant or without probable cause for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words". See Mapp v. Ohio, 367 U.S., at 648, 6 L.Ed. 2d 1081, 81 S. Ct. 1684, 84 ALR2d 933."

Basing its decision on *Wong Sun* and holding that the decision therein mandates consideration of a statement's admissibility in light of the interests of the Fourth Amendment, the Court continued at page 427:

> "It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the Miranda warnings, Alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See Westover v. United States, 384 U.S. 436, 496-497, 16 L.Ed. 2d 694, 86 S. Ct. 1602, 10 ALR3d 974 (1966).
>
> "While we therefore reject the per se rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative per se or "but for" rule. The petitioner himself professes not to demand so much. Tr. of Oral Arg. 12, 45, 47. The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human hand are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important fact, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see Johnson v. Louisiana, 406 U.S. 356, 365, 32 L.Ed. 2d 152, 92 S. Ct. 1620 (1972), and particularly, the purpose and flagrancy of the official misconduct are all relevant. See Wong Sun v. United States, 371

> U.S., at 491, 9 L.Ed. 2d 441, 83 S. Ct. 407. The voluntariness of the statement is a threshold requirement. Cf. 18 U.S.C. § 3501 (18 U.S.C.A. § 3501). And the burden of showing admissibility rest, of course, on the prosecution."

Following *Brown*, in *Dunaway v. State of New York*, supra, this Court restated a conclusion reached earlier by the Court in *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed. 2d 676, 89 S. Ct. 1394 (1969) as well as *Brown*, finding that detention, regardless of its label intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. The Court affirmed that a confession after proper *Miranda* warnings may be found voluntary for the purposes of the Fifth Amendment but that such a finding is merely a threshold requirement for Fourth Amendment analysis and in no way meets the test articulated in *Brown* to vindicate the distinct policies and interest of the Fourth Amendment. The Court in *Dunaway* approved of the factors to be considered in determining admissibility of the confession and found the circumstances to be a replica of those presented in *Brown*. The Court held that the accused had been seized without probable cause, on the basis of a tip by an informer which however did not supply enough information to obtain a warrant, and had confessed without any intervening event of significance. The confession was held inadmissible.

It is submitted that the Trial Judge refused to apply the guidelines of *Brown* and *Dunaway*; that no determination was made to determine if the statement of Edwards was free and voluntary considering the lack of causal connection between the arrest and the statement. Even after the Louisiana Supreme Court recognized in its per curiam opinion that no showing had been made pursuant to the requirements of

Brown and *Dunaway*, the Trial Court on remand refused to allow defendant-appellant to inquire into the details and circumstances of the basis for his arrest to the extent which would have allowed a considered determination of whether or not the requisite probable cause, as defined by long prevailing standards, legally existed prior to the time of the arrest. (See *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879, 60 S.Ct. 1302 (1949). Defendant-appellant is entitled to the protection that the safeguards embodied in the Fourth and the Fifth Amendment.

IV. Does the Trial Judge's refusal to allow admission evidence on the question of the defendant-appellant's capacity to stand trial and assist counsel in his defense amount to a denial of due process of law? Is the accused constitutionally entitled to a hearing dispositive of the issue of his competence?

This Court in *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed. 2d 103, 5 S.Ct. 896 (1975) set forth the guiding rationale herein applicable at 43 L.Ed. 2d 112:

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings agianst him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought". Similarly, if he became "mad" after pleading, he should not be tried, "for how can he make his defense?" 4 W. Blackstone Commentaries 24. See Youtsey v. United States, 97 F. 937, 940-946 (CA6 1899). Some have view the common-law prohibition "as a

> by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself. Foote, A Comment on Pre-Trial Commitment of Criminal Defendants," 108 U. Pa. L. Rev. 832, 834 (1960). See Thomas v. Cunningham, 313 F.2d 934, 938 (CA4 1963). For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice. See generally Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 455, 457-459 (1967). Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S., at 402, 4 L.Ed. 2d at 824, 80 S. Ct. 788."

The Court in *Drope* discussed its earlier decision in *Pate v. Robinson*, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S. Ct. 836 (1966) wherein the Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives the accused of his due process right to a fair trial. The Court in *Pate* based such finding upon the failure of the State to invoke statutory proceedings which deprived the defendant therein of the inquiry into the issue of his competence.

Resting upon *Pate* the Court in *Drope* determined that the State Court did not give adequate consideration of the evidence before it which raised the question as to the competency of the defendant. In Louisiana, the Louisiana Code of Criminal Procedure, Article 642 clearly provides that the issue of competency may be raised at any time. Defendant-appellant attempted on several occasions to put the issue

before the Court, but the Court refused to hear the evidence. The findings of the original Sanity Commission, composed of Dr. Landry and Dr. Silva indicated that further examination and evaluation was needed to evaluate. Clearly such findings cannot be deemed dispositive of the issue. Defendant-appellant requested a continuance or mistrial and a full evaluation. The testimony of Fred Tuton, clinical psychologist, in other portions of the trial ultimately revealed the reason why competency was at issue, testifying at page 9 of the transcript of the September 13, 1981 trial:

"By Mr. Barnes:

Q. At the time of your evaluations on Donald Edwards you were able to make several determinations, and just to make sure that they are in the record, would you tell us what your diagnosis was of Donald, and what you found in terms of his mental level, etc.

A. I found him the diagnosis I rendered at that time was schizophrenic reaction, paranoid type. And my recommendations at that time was that he was in fact mentally ill, that he was very changeable. The credibility of his stories would change, that you could not rely greatly on information and details, that probably at the commission or the time of the alleged crime or the crime did take place, for all purposes if he were under stress, as I mentioned before, that he would respond in an irrational manner, that he would not have the foresight to understand what was happening at the time. That he would have difficulty if it would not be almost virtually impossible to really assist his attorney at the time, because of not knowing and understanding what was truth and untruth. And that I would predict that he would consistently change his story from time

> to time as his own personal needs would dictate. And maybe this would maybe not be an irrational way, things that would cause him to change his mind could not necessarily be even maybe to his benefit. I said that I felt in concluding that a present examination of Donald, he would be in need of psychiatric institution care and help for rather severe emotional disorder."

Further, the Court overlooked pertinent portions of the testimony of Dr. Silva and Dr. Landry. Dr. Silva specifically stated that he felt the defendant "wasn't able to cooperate with counsel". Further, Dr. Silva felt that Donald did not have "a good grasp on the importance of the whole situation". Dr. Silva recommended further testing as did Dr. Landry.

Defense counsel undertook the additional testing (see testimony of Fred Tuton, Psychologist), but the Court refused to hear it. The refusal of the Court to allow an examination of the defendant-appellative dispositive of the issue rendered the proceedings constitutionally inadequate to protect the defendant-appellant's due process right not to be tried while legally incompetent.

V. Did the Trial Judge's denial of the defendant's motion to conduct pre-trial hearings in camera prejudice defendant-appellant's Constitutional right to a fair trial?

Section 3.1 of the American Bar Association project on standards for criminal justice, fair trial, and free press, provides in petrinent part:

> "It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:
>
> "Motion to exclude public from all or part of pretrial hearing.

> In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a Motion to Suppress Evidence, the defendant may move that all or part of the hearings be held in Chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury."

In the instant case from the night of the murder until trial, there was widespread and excessive publicity about the murder and the three black suspects who were indicted for the crime and charged with first degree murder. Information about the murder, arrest, and indictments was published numerous times in many newspapers, including the Morning Advocate, the State Times and also, the Louisiana State University School newspaper, the Daily Reveille. There was excessive pretrial television publicity by WAFB-TV Channel 9, WBRZ-TV Channel 2 and WRBT-TV Channel 33. Information pertaining to this case, both pretrial and during trial, was a constant source of subject matter. Pictures and films of the defendant were shown on the television stations before trial and during trial, while comments were being made about the brutal murder of the 78 year old white female.

The defendant's right to a fair trial and public trial should mean that he has the right to minimize publicity which might affect his ability to seat a fair jury. Further, his right to public trial does not necessarily mean that every pretrial proceeding should be subject to public scrutiny. See *Rideau v. Louisiana*, 373 U. S. 723, 10 L.Ed. 2d 663, 83 S. Ct. 1417 (1963).

It should be noted that the In Camera proceeding would

not be violative of First Amendment rights of free speech. See *Nebraska Press Association v. Stewart*, 427 U.S. 539, 49 L.Ed. 2d 683, 96 S. Ct. 2791 (1976). Indeed, if the right to a public trial (or pretrial proceeding) is one of the defendant's "constitutional rights", then he should have the option to waive that right. See Louisiana Constitution, Article I, Section 16.

A review of the evidence in this case will reveal that not only during pretrial hearings, but also during the trial, excessive publicity occurred; it is submitted that same was very prejudicial to the defendant's right to a fair trial and In Camera hearings should have been held.

CONCLUSION

It is submitted that substantial issue, involving safeguards presented by the United States Constitution have been raised and that this Honorable Court should review the proceedings and prior decisions by the Louisiana Courts.

Respectfully submitted,

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By: _____
Walton J. Barnes, II

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing petition for a Writ of Certiorari have been served upon the State of Louisiana through the Honorable Ossie Brown, District Attorney in and for the Parish of East Baton Rouge and Premila Burns Chumbley, Assistant District Attorney, 5th Floor, Government Complex, 222 St. Louis Street, Baton Rouge, Louisiana 70801 by placing same in the United States Mail, properly addressed and postage prepaid on this 11TH day of February, 1982.

WALTON J. BARNES, II
Post Office Box 596
Zachary, Louisiana 70791
(Admitted to United States Supreme Court Bar, October 1, 1979.)

Appendix

APPENDIX A

STATE of Louisiana

v.

Donald EDWARDS.

No. 64204.

Supreme Court of Louisiana.

Nov. 16, 1981.

Rehearing Denied Dec. 14, 1981.

Defendant was convicted in the Nineteenth Judicial District Court, Parish of East Baton Rouge, Frank Foil, J., of first-degree murder and he appealed. After remanding for further findings, 375 So.2d 1365, the Supreme Court, Calogero, J., held that: (1) probable cause existed for defendant's arrest; (2) defendant's confession was not coerced; (3) confession obtained from 17-year-old minor in the absence of his parents was not inadmissible; (4) evidence sustained determination that defendant was competent to stand trial; (5) defendant did not show entitlement to change of venue; (6) exclusion of certain jurors for cause was proper; and (7) res gestae evidence was properly admitted.

Affirmed.

Dennis, J., filed a concurring opinion.

CALOGERO, Justice.

This appeal comes before us again, this time after a remand to the district court for a reopened hearing on the motion to suppress the inculpatory statements made by de-

fendant, Donald Edwards. The statements were made in the presence of police officers shortly following his arrest on charges of first degree murder and aggravated burglary of one Ruth McInnis Todd.

From the original hearing on the motion to suppress, from the trial evidence, and from the reopened hearing conducted after our remand, the following sequence of events can be reconstructed.

On the Tuesday night of January 17, 1978, seventy-eight year old Ruth McInnis Todd was robbed and stabbed to death in her house in Baton Rouge. The perpetrators, with a box of old coins taken from the house, fled in Ms. Todd's yellow Rambler, the keys of which had been removed from her purse. This same vehicle, later parked opposite a 7-11 convenience store, aroused the suspicions of patrol officers Odom and Bourgeois when they drove past and observed the three occupants give them "a real good look." When the officers completed their turn around the block, the car had been abandoned but its interior was littered with wrappers of the type used for old coins. Having seen three males of the general description of those seen in the car in the 7-11 store and buttressed by the testimony of the clerk in the 7-11 store, Odom and Bourgeois chased an Olds Cutlass leaving the 7-11 parking lot. The officers arrested the three occupants, found wearing clothes similar to those observed when Odom and Bourgeois initially passed the parked Rambler. These three were released three days later (Friday afternoon) when their alibis for the time in which the Todd crime occurred proved strong, and the clerk, according to police officers, recanted his positive identification. Before the trio's release, one of them, Felton Porter, told homicide detective Gardiner that he had seen a "young dude" approach the Rambler while it

was being inspected by officers Odom and Bourgeois, but then turn around and walk quickly away. By this time, detective Gardiner had also received lists of possible suspects from the auto theft and burglary divisions but these were not used because of information received over the weekend.

Late Friday evening and early Saturday morning, a person arrested and later released on a separate charge suggested two possible lines of inquiry about the Todd murder to Gardiner, one of which included the names of four young men: a local neighborhood information source, Michael Hatch, and three possible suspects, Norman Kent, Michael Sheppard, and "Mule". When the information given on the first line of inquiry proved unproductive over the weekend (that lead unexplained by the officers and not pertinent here), Gardiner returned on Monday morning to the four names and particularly to Michael Hatch, the alleged eyes and ears of the neighborhood. Michael Hatch revealed that around 11:00 or 11:15 P.M. on Tuesday, January 17th, he was leaving the Dalton Theatre area heading towards Plank Road when he met John Norman Kent, Michael Sheppard, and Donald Edwards (whose nickname was Mule). Although it was not particularly cold, the three were wearing gloves, carrying a box, and indicated that if the police came they'd "better haul." Hatch continued walking, saw the activity around the yellow Rambler parked across from the 7-11 store, and went home.

Likewise, in the course of investigating the Todd crime, Lieutenant Gill, supervisor of the armed robbery division of the Baton Rouge Police Department, received word from a confidential informant about a poker game which had taken place shortly after the murder — probably Wednesday or Thursday night. The same three young men, placed by Michael Hatch in the vicinity of the yellow Rambler under suspicious

circumstances on the night of the murder, were present at the poker game at which old coins were used for betting. Furthermore, Gill's informant heard Norman Kent bragging about the Todd murder. Information supplied by this informant about where one of the participants was staying was verified as correct. A second informant, known only to Lieutenant Gill by a first name, telephoned in detailed information of the Rambler's location by the 7-11 store Tuesday night and spoke of seeing three males running from the vehicle.

With this information gathered by both the homicide and armed robbery divisions, but without a warrant, officers arrested John Norman Kent and Michael Sheppard[1] on Monday afternoon at their high school. Homicide detectives Gill and Breaux went to Donald Edwards' house around 2:00 P.M. that same day to arrest him. Not finding him home then, they returned with Officers Lasoyne and Allain as back-up around 3:00 P.M. and arrested Edwards in the presence of both his parents. The officers gave him his *Miranda* warnings. According to the records, all three suspects were booked at 3:15 P.M. Norman Kent confessed to the crime and implicated Sheppard and Edwards. Questioning of Edwards began at 5:00 P.M. with Officers Allain and Lasoyne again reading him the *Miranda* warnings and obtaining his signed waiver. During the questioning, officers played Edwards a portion of Kent's confession. At 5:28 P.M. on Monday, January 23, 1978, Donald Edwards gave a taped statement of his own, admitting his complicity in the activities which culminated in the stabbing death of Ruth Todd.

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1. Michael Sheppard pleaded guilty to manslaughter pursuant to an agreement to testify for the state at the trials of Norman Kent and Donald Edwards, respectively. Norman Kent was successful in having his confession suppressed because he was fifteen at the time it was made without the prior consultation mandated by *Dino*. *State v. Kent*, 371 So.2d 1319 (La. 1979). He was convicted nonetheless and his conviction was affirmed by this Court *State v. Kent*, 391 So.2d 429 (La. 1981).

After hearing the state's evidence at trial, particularly Edwards' taped confession and the testimony of Michael Sheppard, the jury found Edwards guilty of first degree murder and sentenced him to life imprisonment.

In his original appeal to this Court, defendant's counsel argued thirty assignments of error. As one of these, defendant alleged that the trial judge erred, at the hearing on the motion to suppress Edwards' inculpatory statement, in cutting off defense inquiries into the identity and reliability of the police informants. Such inquiry, he asserted, was necessary under *State v. Scott*, 355 So.2d 231 (La. 1977) and the Supreme Court decisions of *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) and *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). It was determined by this Court on first entertaining defendant's appeal that such questioning should have been allowed relative to establishing the presence or absence of probable cause for the warrantless arrest of Edwards. In a per curiam opinion, the case was remanded to the district court to re-open the hearing on the motion to suppress with the instruction that if probable cause were not found to sustain the arrest, the trial judge should vacate the sentence and order a new trial to be held without the benefit of Edwards' taped inculpatory statement. If, on the other hand, the trial judge affirmed its denial of the motion to suppress by finding probable cause for Edwards' arrest, the case should be returned to this Court for further consideration of that and the other outstanding assignments of error made in the original appeal to this Court. *State v. Edwards*, 375 So.2d 1365 (La. 1979).

On remand, the trial judge did determine that there was probable cause for the warrantless arrest of Donald Edwards for the aggravated burglary and murder of Ms. Todd. Upon

this renewed appeal, defendant contends that the trial judge erred in this decision and alternatively that his other assignments of error, originally urged and not yet considered, warrant our reversal of his conviction. Thus, we address first this question of probable cause to make a warrantless arrest.

ASSIGNMENTS OF ERROR TWO, THREE AND TWENTY-TWO

La.C.Cr.P. art. 213, allows police officers to make arrests without a warrant when "(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer." Concerning the standards for judging an officer's action in situations called for in the codal provision, this Court said in *State v. Marks*, 337 So.2d 1177 at 1181 (La. 1976):

> Reasonable cause, which we have treated as consonant with the probable cause concept, exists when the facts and circumstances known to the arresting officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. Reasonable or probable cause must be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act. . . . (Citations omitted)

[1] While the state's burden relative to the propriety of an arrest is far less than that concerning trial and conviction, mere suspicion on the part of the arresting officers is not enough. *State v. Ranker*, 343 So.2d 189 (La. 1977). *State v. Randolph*, 337 So.2d 498 (La. 1976).

[2] When the defendant challenges the admissibility of a confession on the ground that it was the result of an arrest

made without probable cause, the burden of showing admissibility rests on the prosecution. *State v. Scott*, 355 So.2d 231 (La. 1977); *Brown v. Illinois*, *supra*.

At the original hearing on the motion to suppress, there had been testimony that the implicating statement by Norman Kent, along with other evidence, prompted the arrest of Donald Edwards. On remand, the trial judge was not much impressed with the possibility of Kent's implicating statement having triggered the arrest of Edwards since Kent and Edwards may have been arrested simultaneously.[2] Nonetheless, the other facts shown at the earlier suppression hearing were, at the renewed hearing, buttressed and supplemented; and the court found that probable cause had existed to support the arrest of Edwards. That trial court ruling was not erroneous.

The police had received information from several sources: two informants reported to Lieutenant Gill and remain unidentified to the defense and to this Court;[3] a third informant reported to Detective Gardiner and was identified on remand as Michael Hatch.

[3] This Court has held that the test used to ascertain the credibility of confidential police sources which provide the probable cause to make a warrantless arrest is the same as the one used to determine the credibility of information derived from confidential police sources and contained in a search warrant. *State v. Rudolph*, 369 So.2d 1320 (La. 1979).

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2. Police records show that Edwards and Kent were both booked at 3:15 P.M., January 23, 1978.

3. The defense again urges in this appeal that in order for the state to sustain its burden of proving that the arrest was legal, the identity of all informants must be revealed. This Court has never so required. In *State v. Diliberto*, 362 So.2d 566 (La. 1978) this Court stated:

That test set forth in the United States Supreme Court decision of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) was incorporated by this Court in *State v. Paciera*, 290 So.2d 681 at 685-686 (La. 1974) wherein we said:

> The affidavit submitted to the magistrate may be based entirely upon hearsay, but, if so, it must set forth underlying circumstances and details sufficient to provide a substantial factual basis by which the magistrate might find reliable both the informant and the information given by him. Factors which support the credibility of an unidentified informant include prior accurate reports or any specific independent corroboration of the accuracy of the instant report. Factors which support the credibility of the information reported include (a) direct personal observation by the informant, or (b), if the information came indirectly to the informant, the reasons in sufficient factual detail for the magistrate to evaluate and credit the reliability both of the indirect source and of the indirectly-obtained information. (Emphasis omitted) See also *State v. Smith*, 350 So.2d 1178 (La. 1977); *State v. Linkletter*, 286 So.2d 321 (La. 1973).

The confidential information and sources upon which the state relies to argue the existence of probable cause to arrest do not fall short under the *Aguilar/Paciera* standards.

[4] Lieutenant Gill's unidentified confidential informant (1) had, over about a seven year period, provided the authori-

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(1) When the issue is not guilt or innocence, but instead the probable cause for an arrest or search, police officers need not invariably be required to disclose an informant's identity, if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a confidential informant. *McCray v. Illinois*, 386 U.S. 300, 305, 87 S.Ct. 1056, 1059, 18 L.Ed.2d 62 (1967).

ties with information which led to armed robbery, burglary and murder convictions and (2) had been present at the poker game, had personally observed the use of the old coins for betting and had personally heard the remarks about the murder.[4] Additionally, the address of one of the participants given by this informant had been verified by the authorities.

Detective Gardiner's informant, Michael Hatch, was identified at the remand hearing. He had volunteered information about what he had seen on an earlier evening while returning home from the movies. Police officers conducting an ongoing criminal investigation are entitled to question those individuals who may have seen or heard something in the vicinity of the alleged criminal activity, and they are entitled to credit that information, absent knowledge of facts which would cast serious doubt on the information or its source.

Finally, it is immaterial that Officer Gardiner did not participate in the actual arrest of Donald Edwards. The observations and reports of fellow police officers who are engaged in related investigations can provide reasonable basis for an arrest. See *State v. Linkletter, supra.*

[5] In summary, it is clear that by the morning of January 23, 1978,[5] the police knew that Norman Kent, Michael Sheppard and Donald Edwards had been seen wearing gloves,

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4. Admittedly, Gill's second informant, known only by a first name, did not meet *Aguilar* requirements, but the information about three males running from the Rambled was only cumulative.

5. Defendant also argues that, if the police had the information in advance, they should have obtained a warrant. Generally, there is no requirement that an officer with probable cause to arrest obtain an arrest warrant. *State v. Linkletter,* 345 So.2d 452 at 456 (La. 1977). But see *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) and *State v. Brown,* 387 So.2d 567 (La. 1980).

leaving the area where Ruth Todd's yellow Rambler had been abandoned, having in their possession a box, and indicating that they had "better haul" if the police approached. The police also knew that the same three were present at a poker game a day or two after the murder, at which game old coins were used for betting (old coins had been taken from Ruth Todd's house) and one of the three was bragging about the murder.

We affirm the trial judge's determination concerning probable cause to arrest and his ruling denying the motion to suppress the inculpatory statements of Edwards.[6] The assignments of error on this issue lack merit.

Because we pretermitted consideration of the other assignments of error on our first consideration of defendant's appeal, we address them now.

ASSIGNMENTS OF ERROR FOUR, FIVE, SIX, AND TWENTY-ONE

Besides the complaint discussed above, challenging the admissibility of the confession on probable cause grounds, the defendant argued other reasons for suppressing the statement. These are included in assignments of error four, five, six and twenty-one.

[6] Defendant contends that he was not fully informed of the charges leveled against him when he was arrested, in contravention of Article I Section 13 of the Louisiana Constitution of 1974 which provides in pertinent part:

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6. Because we find that the arrest was legal because based on probable cause, we need not consider the state's alternative argument that the statement was sufficiently attenuated from the illegal arrest to allow its admission at trial. See *Brown v. Illinois, supra.*

"Section 13. When any person has been *arrested or detained* in connection with the investigation or commission of any offense, he shall *be advised fully of the reason for his arrest or detention,* his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the *nature and cause of the accusation against him.* (Emphasis supplied)

Edwards says that he thought the charges consisted only of aggravated burglary and purse snatching. Testimony of those involved in the arrest indicate otherwise.[7]. Furthermore, defendant admits that prior to giving his statement, he was aware of the first degree murder charge.

[7] In a similar vein, defendant claims that he was not fully advised of his constitutional rights before the statement was given. The *Miranda* requirements have been incorporated into the Louisiana Constitution of 1974, Article I, Section 13 (For complete discussion, *see* L. Hargrave. The Declaration of Rights of the Louisiana Constitution of 1974. 35 La.L.Rev. 1 (1974)). The trial record reveals that the state offered affirmative proof that Donald Edwards was informed of these rights orally at least twice. Then prior to giving the taped statement, he signed a waiver verifying that he understood that he was giving up the constitutional protections afforded him by these rights. His taped statement played for the trial jury and by this Court also contains a colloquy between the

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7. His parents testified that they were not aware of the murder charge until they saw it on the ten o'clock news. However, Mrs. Edwards admits that Officer Gill told her that she could either accompany her son to the station, or phone in thirty minutes for any added information she needed. She did phone the station. Then within several hours and before the late evening news, two officers returned to the Edwards residence, obtained Mrs. Edwards' permission to search, and seized a pair of Converse tennis shoes, a pair of jeans and a hat belonging to Donald.

questioning officers and Edwards as to the rights he was waiving in making his statement.

A third contention in these assignments of error is that it was error to permit the statement's admission at trial because the defendant was "only seventeen (17) years old" and the statement was made "without conferring with or being in the presence of his parents." In briefs to this Court, defendant asks the Court to hold that the requirements set forth in *State in the Interest of Dino*, 359 So.2d 586 (La. 1978) should apply equally to persons seventeen years of age as well as to juveniles (i. e., those under seventeen). Defendant's principle thrust is that a seventeen year old, while an adult for purposes of criminal law, is a minor rather than a major under the civil law. Furthermore, he points to the use of the word "minor" in the *Dino* opinion itself: "In any event, it is the general policy of our law to protect all *minors* from the possible consequences of immaturity." 359 So.2d at 593.

In *Dino* we were dealing with a juvenile; we repeatedly said juvenile;[8] and in laying down the rule, we held that it would apply to juveniles:

> [W]e hold that in order for the State to meet its heavy burden of demonstrating that a waiver is made knowingly

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8. For example:

Similarly, the rights which a *juvenile* may waive before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or adviser so relatively simple and well established as a safeguard against a *juvenile's* improvident judicial acts, that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights. Assessments of how the "totality of the circumstances" affected a *juvenile* in a particular case can never be more than speculation. Furthermore, whatever the background of the *juvenile* interrogated, assistance of an adult acting in his interest is indispensable to overcome the pressures of the interrogation and to insure that the *juvenile* knows he is free to exercise his rights at that point in time. (Emphasis added) *supra* at 592. (Footnotes omitted)

> and intelligently, it must affirmatively show that the *juvenile* engaged in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his welfare before he waived his right to counsel and privilege against self-incrimination. (Emphasis supplied) (Footnote omitted)

Therefore, the reference in the quotation cited by defense counsel was, at best, merely a broad statement concerning the law and youngsters generally. At worst, it was an inadvertent use of the word "minor" in an opinion whose focus and restricted holding was juveniles. *Dino*, as we understand it, is not precedent for requiring that minors seventeen years of age have a parent present when making statements to police authorities.

The question of whether a seventeen year old minor should have a parent present during criminal interrogation is *res nova*. The age at which a teenager is by law construed to have or not have the maturity and competence to knowingly waive his or her constitutional rights is admittedly perhaps an arbitrary line. No doubt in actuality there are sixteen year olds whose knowledge of and ability to comprehend their legal rights surpasses the knowledge of many who are older but less wise.

[8] The law, nonetheless, requires definition. We opted for a prophylactic rule in *Dino* and fixed the age at under seventeen: a line traditionally drawn for criminal responsibility between the juvenile[9] and the adult. There is no impera-

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9. Though the word *juvenile* is without ambiguity as it appears in the statutes, the demarcation line for the court's jurisdiction for juvenile offenders lies at "less than seventeen." For a thorough discussion of the relevant statutory language contained in La.Const. Art. 5, Section 19, LSA R.S. 13:1569(3) and (4), LSA R.S. 13:1571.1(C) and C.J.P. Art. 13(7) and (9), *see State in the Interest of Lewis*, 377 So.2d 1322 at 1323, 1324 (La.App. 1st Cir., 1979).

tive reason to extend the *Dino* requirements to the minor who is a seventeen year old adult.

[9] Finally, the voluntariness of the taped statement was challenged at the hearing on the motion to suppress. Clearly the burden of proving voluntariness lies with the state.

> Before a confession may be introduced into evidence, the State must establish beyond a reasonable doubt that the inculpatory statement was freely and voluntarily made. La.C.Cr.P. art. 703(C); La. R.S. 15:541; *State v. Glover*, 343 So.2d 118 (La. 1977). See also, *State v. Cobbs*, 350 So.2d 168 (La. 1977); *State v. Scott*, 344 So.2d 1002 (La. 1977); *State v. McSpaddin*, 341 So.2d 868 (La. 1977). *State v. Scott*, 355 So.2d 231 at 233 (La. 1978).

However, it is equally as clear that "[t]he admissibility of the confession is a matter for determination by the trial judge, and his conclusions as to the credibility of witnesses testifying as to voluntariness will not be disturbed unless unsupported by the evidence." *State v. Cobbs, supra; State v. Schamburge*, 344 So.2d 997 (La. 1977); *State v. Ross*, 343 So.2d 722 (La. 1977); *State v. Hollingsworth*, 337 So.2d 461 (La. 1976).

[10] The record contains no indication that the trial court abused its discretion. The state presented witnesses attesting to the voluntariness of Edwards' statement. These were countered by Edwards' contention that the officers questioning him on Monday afternoon extracted the statement from him through coercion. Officers Allain and Lasoyne returned to the stand, reaffirmed their initial disclaimers and specifically rebutted defendant's allegations. *State v. Peters*, 315 So.2d 678 (La. 1978). Upon our review of the evidence presented at the hearing on the motion to suppress and at the trial on the merits, and of the taped statement of Edwards himself, the

Court affirms the trial judge's decision that the statement admitted into evidence at trial was voluntarily made.[10]

Assignments of error four, five, six and twenty-one lack merit.

ASSIGNMENTS OF ERROR NUMBER SEVEN AND TWENTY-NINE

By these assignments, defendant asserts that the trial court erred in denying his motion to quash which challenged the constitutionality of Louisiana's first and second degree murder statutes.

On the date of the crime, La.R.S. 14:30, defining first degree murder, read: "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm." Second degree murder was the killing of a human being when the offender was engaged in the perpetration or attempted perpetration of certain enumerated felonies. Second degree murder was also "the killing of a human being when the offender has a specific intent to kill under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure." La.R.S. 14:30.1 (added in 1977).

Defendant contends that the second definition of second degree murder, with its overlap with first degree murder, leaves the jury without a standard to guide its choice between the greater and lesser offenses. This Court answered the de-

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10. Counsel for the defense also raised the competency question at the motion to suppress. This question is addressed thoroughly in our discussion of Assignments of Error Eight and Nine.

fense contention when it decided *State v. Payton*, 361 So.2d 866 (La. 1978). In *Payton*, the Court held that in amending La.R.S. 14:30.1, the legislature also tacitly amended La.R.S. 14:30, introducing the aggravating circumstances of La.C. Cr.P. Art. 905.4 as specific essential elements of the crime of first degree murder. The Court then excised certain of the aggravating circumstances in La.C.Cr.P. Art. 905.4 from the definition of first degree murder in order to preserve the statute from other constitutional attack. The Court has held that heinousness, prior conviction for an unrelated murder, aggravated rape or aggravated kidnapping; and murder by one imprisoned under sentence for a felony, were not part of the definition of first degree murder although these remained valid considerations in the penalty phase of the bifurcated trial.

[11] The record indicates that defendant was tried in conformity with *State v. Payton, supra*. The trial court instructed the jury at the close of the guilt phase of the trial that it had to find one of the constitutionally valid aggravating circumstances of La.C.Cr.P. Art. 905.4 in order to return a verdict of first degree murder. The trial court did erroneously include in the charge La.C.Cr.P. Art. 905.4(f): "(t)he offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony." As that situation is wholly removed from the facts of the instant case, this mistaken inclusion could not possibly have prejudiced the defendant.

These assignments lack merit.

ASSIGMENTS OF ERROR NO. 8, 9, AND 30

By these assignments, defendant contends that the court erred in finding the defendant competent to stand trial and

"in failing to order the defendant to undergo further diagnostic evaluation after receiving reports from the sanity commission;" "in denying motions filed to have the defendant further evaluated to determine competency" and "by not declaring a mis-trial (during the trial) as a result of (this) incompetency", and "in not allowing evidence to support the issue raised concerning this competence at various stages of the proceedings;" and "in refusing to grant a motion for a mistrial as a result of the temporary incompetence of the defendant during the sentencing hearing", and not allowing evidence of that incompetence to be put in the record.

Essentially the various complaints involved in these assignments of error address the single question of defendant's capacity to stand trial. The merit or demerit of each of them is essentially controlled by whether the trial judge was correct when he ruled following a Sanity Commission Hearing that defendant was capable of standing trial.

[12] It is the defendant's burden to prove his incapacity to stand trial by a clear preponderance of the evidence. *State v. Hamilton,* 373 So.2d 179 (La. 1979); *State v. Coco,* 371 So.2d 803 (La. 1979); *State v. Lawrence,* 368 So.2d 699 (La. 1979; *State v. Weber,* 364 So.2d 952 (La. 1978); *State v. Veal,* 326 So.2d 329 (La. 1976); *State v. Flores,* 315 So.2d 772 (La. 1975); and *State v. Marks,* 252 La. 277, 211 So.2d 261 (1968).

[13] The trial judge's ruling was a difficult one primarily because of defendant's failure (the trial judge found it a refusal) to cooperate with the two examining physicians who made up the appointed Sanity Commission. It was because of defendant's general lack of cooperation and his unresponsive and flippant answers that Dr. Silva, and Dr. Landry to a lesser degree, felt that defendant should be subjected to a longer

period of observation of his mental status. It is noteworthy, however, that neither expressed the opinion that defendant was incapable of standing trial.

We recently had occasion to consider on appeal a case almost identical to this one. In fact, the same Sanity Commission, Drs. Silva and Landry, were involved there. *State v. Holmes*, 393 So.2d 670 (La. 1981). We affirmed Holmes' conviction choosing to credit the trial judge's determination of capability on the strength chiefly of the judge's assessment that defendant was capable but intentionally uncooperative. As we said then, "defendant cannot prove his incapacity to stand trial merely by having stymied the efforts of the Sanity Commission."

The only difference between *Holmes* and this defendant, Edwards, in their respective cases is that in *Holmes* the trial judge called the defendant to the stand (over his objection) and asked him a wide variety of questions. In this case, the trial judge's assessment of Edwards' capacity to stand trial was correspondingly aided by his having observed defendant at various pretrial hearings and by having heard defendant testify as well, at a pretrial hearing.

As we stated in *Holmes*:

> ". . . It is ultimately the responsibility of the judge to determine whether a defendant possesses the mental capacity to proceed to trial. C.Cr.P. Art. 647. The report of the sanity commission is admissible as evidence, but it cannot be used as a substitute for the court's own judgment. *State v. Lawrence*, supra; *State v. Crochet*, 354 So.2d 1288 (La. 1977); *State v. Bennett*, supra [345 So. 2d 1129 (La. 1977)]. Moreover, a trial judge's determination of a defendant's capacity to stand trial is entitled to great weight; *State v. Hamilton*, supra; *State v. Coco*, supra; *State v. Lawrence*, supra; *State v. Weber*, supra;

State v. Morris, 340 So.2d 195 (La. 1976); *State v. Fiores*, supra. Here, the trial judge did not refuse to accept the opinion of medical experts; no opinion as to the defendant's capacity to stand trial was offered, other than the suspicion that defendant was malingering. The issue is not whether the sanity commission usurped the judge's function, but whether the judge could reasonably make a determination of defendant's present sanity when the doctors could not." *State v. Holmes*, 393 So.2d 670 at 673 (La. 1981).

We do not find erroneous the trial judge's determination in this case that the defendant was capable of standing trial. There is not merit to these asignments of error.

ASSIGNMENTS OF ERROR ONE AND TEN

Defendant contends that the trial court erred in denying his motion for a change of venue grounded upon excessive pretrial publicity. He further avers that, the trial judge erred in denying the motion to compel in camera hearings, including that concerning change of venue, thereby he jeopardized defendant's right to a fair trial before an impartial jury because of misleading or inadmissible evidence to which the public and the jury had been exposed by the attendant publicity.

Article 622 of the Louisiana Code of Criminal Procedure provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or

> the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of the witnesses at the trial.

[14, 15] To be entitled to a change of venue, the defendant must prove that there is such prejudice in the collective mind of the community that a fair trial is impossible. *State v. Smith*, 340 So.2d 222 (La. 1976); *State v. Clark*, 340 So.2d 208 (La. 1976); *State v. Berry*, 329 So.2d 728 (La. 1976). Whether the defendant has made the requisite showing is a question addressed to the sound discretion of the trial judge. *State v. Clark, supra; State v. Berry, supra; State v. Wilkerson*, 326 So.2d 353 (La. 1976); *State v. Stewart*, 325 So.2d 819 (La. 1976).

State v. Passman, 345 So.2d 874, 880 (La. 1977) summarizes the considerations governing the exercise of that discretion:

> In *State v. Bell*, 315 So.2d 307 (La. 1975), this Court set forth the following factors to be considered in determining whether to change venue:
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> > * * *(1) (T)he nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (2) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. 315 So.2d at 311.
>
> Other facts we regard as relevant to this inquiry include:

> * * * The degree to which the publicity has circulated in areas to which venue could be changed, the care exercised and the ease encountered in the selection of the jury, the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors or the trial jurors, and the peremptory challenges and challenges for cause exercised by the defendant in the selection of a jury. See, generally, Annotation 38 A.L.R.3d 17 (1970). *State v. Berry*, 329 So. 2d 728 (La. 1976).

To the first factor, defendant argues that from the night of the murder until trial there was "widespread and excessive" publicity about the murder and the three suspects who were indicted for the murder. At the hearing on the motion to change venue, the defendant presented several witnesses[11] to support his contention. From the record of these proceedings there does not appear to be any showing that the media reports were other than "objective coverage." *State v. Bennett*, 341 So.2d 847 (La. 1976); *State v. Stewart, supra.*

[16-18] The state contends that the publicity was not excessive and did not supercede the degree of publicity in other cases in which this Court upheld the denial of the mo-

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11. Dr. Perry H. Prestholdt, an expert in the field of social pyschology was called by defendant to describe the nature of the pretrial publicity. He testified that there were six television news broadcasts concerning the murder on three days, January 18, 23, and February 1, 1979. On cross-examination, Dr. Prestholdt admitted that he had done no studies to discover the effect of the pre-trial publicity in the present case. Furthermore, Dr. Prestholdt admitted that normally in a news report on a homicide one would find the name and age of the victim, the means of inflicting death, and the names, ages, and addresses of the arrested persons.

Mr. John Spain, the news director of Channel 2 confirmed that these stories were only forty-five to sixty seconds long. However, since the segments were shown on both the 6:00 and the 10:00 p.m. news there was a total of six segments.

tion for a change of venue.[12] See, *State v. Williams*, 354 So.2d 562 (La. 1978); *State v. Berry, supra; State v. Wilkerson, supra; State v. Stewart, supra.* Publicity, merely because it is extensive, does not mandate a change of venue. It must affect the defendant's ability to receive a fair trial.

We do not find that it did.[13]

The second factor, the connection of government officials with the release of the publicity was shown by the testimony of former Chief of the Baton Rouge City Police, Howard Kidder, and Assistant District Attorney, Premila Chumbley. Chief Kidder testified that he gave a brief impromptu factual press conference on the night that Sheppard, Kent, and Edwards was arrested.

However, no inflammatory actions at this conference was alleged by the defendant.

Mr. Kidder compared this press conference with other press conferences in other major murder cases and noted that this press conference was nothing out of the ordinary.

On April 12, 1978, at the second hearing on the motion, Premila Chumbley, an assistant district attorney, testified

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12. John Spain, the news director of Channel 2, compared the case with the *State v. Bell, supra* and the Valerie Morelock case (*State v. Sheppard*, 350 So.2d 615 (La. 1977). He stated that the present case generated "quite a bit less" coverage than those cases.

In *State v. Foy*, 278 So.2d 38, at 41, (La. 1973) this Court upheld a denial of a motion to change venue because the publicity in the matter "was not greater than in other cases of similar nature" and because defendant had not borne his burden of proving a sound reason for change of venue.

13. In addition to the television coverages most of the newspaper articles were not even on the front page of the newspaper. Furthermore, the grand jury indicted the defendant on February 1st and the last news coverage before the hearing was on February 3, 1978, a full seven months before trial.

that she gave newsman John Voinche mug shots of the three defendants in response to his asking if she could identify each of the three defendants on some footage that Channel 9-TV allegedly had.

Ms. Chumbley stated that "(i)t was not until I went home that night and viewed the six o'clock news that I saw these particular mug shots were run in and of themselves." Without mentioning these mug shots in his brief, defendant argued that the assistant district attorney's actions connected a governmental official to the release of information.

To this Ms. Chumbley testified that she did not intend for these mug shots to be used on television. Furthermore, the persons seeing these photographs on television probably, if they even realized that they were mug shots, would have thought that they were taken when the defendants were arrested for this crime. Even if the release of the mug shots prejudiced the defendant, the release occurred approximately 2½ months prior to the hearing and approximately 8 months before his trial, so that the prejudical effect of the pictures' release (eight months earlier) if any existed had been severely diminished by the time of defendant's trial.

The third factor in the test for a motion to change venue concerns the length of time between the dissemination of the publicity and the trial. The defendants were arrested on January 23, 1978. The television broadcasts occurred on January 18, 23 and February 1, 1978. Newspaper articles were published on January 18, 21, 24 and 27. Defendant's trial did not begin until September 5, 1978.[14] Therefore, a seven month period elapsed between this publicity and the trial.

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14. Although more than likely there was publicity immediately prior to the trial, that publicity is not before the court.

The severity and notoriety of the offense is the fourth factor of the test. While the brutal stabbing of a seventy-eight year old woman by three teenagers would be severe and potentially a notorious crime, no public outcry of rage and vengeance was proven to have occurred in this case.

The fifth factor concerns the area from which the jury is to be drawn. In this case, the juror were drawn from the Parish of East Baton Rouge and defendant established that all of the publicity covered this area.

The sixth factor includes other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant. The defense argued that a certain film shown on television which depicted Donald Edwards and the other two defendants walking in the courthouse would affect the attitude of the community. Dr. Prestholdt testified that on the film that was shown on Channel 2 in Baton Rouge, the defendant, Donald Edwards, was acting in a very inappropriate manner. He stated, "I would describe his behavior as being a mugging behavior; okay, an outrageous kind of behavior; waving his arms and mugging in front of the camera, showing off, cocky or flippant or unconcerned on his—on his behavior." The other visual presentation described by Dr. Prestholdt was a drawing at the assignment of attorneys which depicted defendant sitting at a table with his head down on his arms. Dr. Prestholdt stated that, ". . . I assumed asleep or at least resting or at least not attending to the court proceedings that were going on. Dr. Prestholdt concluded that these presentations made the defendant seem "cold, remorseless, and insolent."

At the change of venue hearing, the assistant district attorney contended that the behavior of Donald Edwards

should not be charged to the state. Donald Edwards chose to behave this way on the film. The film only depicted what was actually done by the defendant. A change of venue should not be granted on the defendant's inappropriate actions alone. Furthermore, this film was shown approximately seven months prior to defendant's trial. Any potential for prejudice would have been decreased by the time of the trial.

No actual evidence was presented as to the seventh factor. That factor concerns anything likely to affect the candor and veracity of the prospective jurors on voir dire. The defense attempted to argue that the film of Donald Edwards' insolent behavior would affect the candor and veracity of the jurors. That allegation is not supported by the evidence. Defendant did not carry his burden of proof as to this factor.

After reviewing all of the evidence presented at the hearing, we cannot say that the trial judge erred in finding that the defendant did not carry his burden of proving that a fair and impartial trial could not be obtained in East Baton Rouge Parish.

As an alternative to a change of venue, defendant wanted the pre-trial proceedings to be conducted in camera.

The defendant's primary contention concerning the in-camera hearing was that the publicity arising from pre-trial hearings might be rife with statements and allegations which would be inadmissible at the trial on the merits. If so, he alleged his ability to receive a fair trial would be jeopardized. Defendant cites, however, no specific instances to support his contention that pre-trial publicity prejudiced his right to a fair trial.

In *State v. Lewis*, 353 So.2d 703 (La. 1977) this Court

found that the defendant's request for in-camera proceedings was properly denied by the trial court. The defendant in that case, as in this one, offered no authority to conduct pretrial hearings in camera; made no showing that in-camera hearings were necessary; nor did he make any allegations on appeal that prejudicial publicity actually resulted from the public hearings.

This assignment of error, concerning both the motion for a change of venue and the motion to compel in camera hearing, lacks merit.

ASSIGNMENTS OR ERROR NUMBER ELEVEN, TWELVE AND FIFTEEN

By these assignments, the defendant complains that the trial court erroneously granted the state three challenges for cause of prospective jurors.

[19, 20] Initially, we note that the record shows that the state used only ten of its twelve peremptory challenges. La. C.Cr.P. art. 799. Consequently, the erroneous allowance to the state of a challenge for cause to a prospective juror is not grounds for a defense complaint unless the effect of the ruling is to allow the state more peremptory challenges than it is entitled to by law. La.C.Cr.P. art. 800; *State v. Labostrie*, 358 So.2d 1243 (La. 1978). In the instant case, therefore, defendant would have reason to complain only if all three of the challenges were erroneously granted.

[21] The trial judge is vested with broad discretion in ruling on challenges for cause and his ruling will be reversed on review only where it appears, upon review of the voir dire examination as a whole, that the judge's exercise of that discretion has been arbitrary and unreasonable, resulting in

prejudice to the accused. *State v. Sonnier*, 379 So.2d 1336 (La. 1979), (on rehearing 1980); *State v. Labostrie, supra; State v. Sheppard*, 350 So.2d 615 (La. 1977).

[22] Two of the prospective jurors for whom the trial judge granted the state's challenges for cause knew defendant's family. These jurors expressed concern about their ability to reach a verdict based solely upon the evidence presented at trial. The trial judge therefore did not err in granting challenges for cause of these two prospective jurors. The third juror of whose dismissal defendant complains, presents a closer question, as this juror stated that she had read newspaper accounts of the crime when it first occurred and expressed concern about the release of the first suspects arrested in the case, wondering if perhaps defendant had also been mistakenly arrested. We need not reach the question whether the trial judge erred in granting the challenge for cause of this juror. Even if the challenge was erroneously granted, it did not have the effect of giving the state additional peremptory challenges because the state used only ten of its allotted twelve peremptory challenges.

These assignments lack merit.

ASSIGNMENTS OF ERROR NUMBER THIRTEEN AND SIXTEEN

By these assignments of error, the defense asserts that the trial court improperly excused thirteen prospective jurors on *Witherspoon* grounds.

[23] The trial court excused these prospective jurors because of their expressed fixed opinions against the death penalty. La.C.Cr.P. art. 798(2). The voir dire examination reveals that these jurors responded to questions regarding

returning a death penalty with answers such as: "I couldn't take the boy's life," and "I would never go with death regardless of what the evidence or the law would be." The trial judge's rulings were therefore correct in each case.

Defense counsel argues that *Witherspoon* challenges have no role in a bifurcated capital sentencing scheme. In *State v. George*, 371 So.2d 762, 765 (La. 1979), this court observed that "examination of the *Witherspoon* decision discloses that the statute involved therein provided for a bifurcated proceeding similar to ours, allowing the jury the discretion to impose a sentence of death or imprisonment." Defendant's argument has thus been rejected by this court.

[24] Furthermore, this defendant did not receive the death sentence and this court has consistently held that a defendant who does not receive the death penalty has no valid *Witherspoon* complaint. *State v. George, supra; State v. Drew*, 360 So.2d 500 (La. 1978); *State v. Sheppard*, 350 So.2d 615 (La. 1977).

There is no merit to these assignments.

ASSIGNMENT OF ERROR NUMBER FOURTEEN

With this assignment, defendant contends that the trial court improperly denied his challenge for cause of a prospective juror, one Rachel M. Guillot.

Miss Guillot remembered reading about the crime at the time it occurred. She stated that she had a "soft spot in [her] heart for old people, especially old women." She had previously said that she had no feeling of revenge and did not consider service on the jury to be her chance to avenge the death of the victim.

Before ruling on defendant's challenge of this prospective juror, the trial judge asked whether she could take the evidence presented in the courtroom and arrive at a decision free of prejudice and bias. The juror responded that she felt that she could. When asked whether she could give defendant a fair trial, the juror told the judge that she would try to do so. Upon receiving these answers, the trial judge denied the challenge.

[25, 26] As stated in our treatment of assignments of error numbers eleven, twelve, and fifteen, the trial judge is vested with broad discretion in ruling on challenges for cause. Only if his exercise of that discretion is arbitrary or unreasonable will his ruling be reversed on appeal. This juror stated that she felt that she could arrive at a decision based upon the evidence and free of bias and prejudice, and that she would try to give defendant a fair trial. Her answers were sufficient to indicate that she could be a fair and impartial juror.

The trial judge did not err in denying the challenge for cause of this juror. The assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SEVENTEEN

This assignment concerns the defense assertion that the trial judge erred in denying the motion to quash the jury.

The petit jury venire was exhausted midway through jury selection. Defense counsel questioned how this could happen when the venire contained one hundred twenty-five people and just over seventy had been called for examination. The jury coordinator testified that of the one hundred fifty called for the general venire, four or five did not receive their subpoenas, six exercised their statutory exemptions under

La.C.Cr.P. art. 403 and sixty seven had been excused by judges of the Nineteenth Judicial District. These excuses were for a variety of reasons, including work hardships, doctor's excuses, and having small children at home. The prospective jurors would record the excuse on their subpoenas and send them back to the jury commission. The courts in the district then passed upon the excuses individually.

[27] Following this testimony, defense counsel moved to quash the petit venire and for a mistrial, explaining to the court that he had known that something was wrong before trial began because the number of people on the venire was too low. The trial court denied the motion to quash as being untimely and then denied the motion for a mistrial because the court did not find any abuse of discretion in excusing the prospective jurors.

Counsel argues that the excusal of the jurors denied defendant his right to a jury composed of a fair cross section of the community.

The trial court correctly observed that defendant's motion to quash the petit venire was untimely. As set forth in *State v. Collins*, 359 So.2d 174, (La. 1978): "[t]he correct procedural device for alleging that the general or petit jury venire was properly drawn, selected or constituted is a motion to quash. LSA C.Cr.P. art. 532(9). The failure of defendant to timely file one constitutes a waiver of the objection." La. C.Cr.P. art. 535(B)(2) (now amended (D)) requires that the motion to quash be filed before trial. While it is conceivable that problems with the petit jury venire might not become apparent until after jury selection has begun, counsel by his own admission knew of the dwindling venire a week before trial.

Furthermore, in *State v. Cass*, 356 So.2d 936, 937 (La. 1978), this Court noted:

> La.Code Crim. P. art. 783 authorized the court to excuse a member of the petit jury venire at any time prior to the time he is sworn as a juror to try a particular case if jury service would result in "undue hardship or extreme inconvenience." We have held that a defendant need not be present when the trial judge excuses prospective jurors before his case is called for trial. *State v. Sheppard*, 350 So.2d 615 (La. 1979); *State v. Williams*, 258 La. 801, 248 So.2d 295 (1971). Moreover, the trial court is vested with broad discretion in excusing prospective jurors for undue hardship. *State v. Ivy*, 307 So.2d 587 (La. 1975). This discretion to release prospective jurors in advance of voir dire examination is not to be disturbed unless there is a showing of fraud or collusion resulting in prejudice to the accused. *State v. Sheppard, supra; State v. Gomez* 319 So.2d 424 (La. 1975).

[28] Defense counsel did uncover what appeared to be two instances of abuse of discretion: a dislike of Baton Rouge traffic on the part of one person called for jury duty and a prior engagement with the Miss America Beauty Pageant for another. Other than these instances, the excuses noted on the subpoenas are legitimate reasons for excusal from jury duty. The two improper excusals are not sufficient to taint the jury selection process and counsel does not point to a pattern of exclusion, or other suggestion of fraud or collusion at work in the case.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER EIGHTEEN

[29] By this assignment, defendant contends that the trial court erred in denying the motion to quash on grounds of the state's systematic exclusion of blacks from the jury panel.

Mrs. Todd, the victim in the case, was white. The jury

that heard the case was all white. Defendant is black. At the close of the jury selection, counsel moved to quash the panel on grounds that the state had used eight of its ten peremptory challenges to excuse black jurors. His motion was denied.

Counsel argues that the state deprived defendant of the equal protection of law, LSA-Const. 1974, art I, § 3 by manipulating its peremptory challenges to assure an all-white jury.

In *State v. Brown*, 371 So.2d 751 (La. 1979) this court followed *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), with regard to equal protection challenges raised against jury selection in a particular case. *Swain* held, in effect, that "it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." 380 U.S. at 223, 85 S.Ct. at 837. In *Swain's* analysis, the conscious exclusion of blacks from a particular jury would only violate the Fourteenth Amendment when it became so broad as to be the functional equivalent of systematic exclusion from the grand or petit jury venires.

In light of Swain, this Court has required proof of the "systematic exclusion over a period of time"[15] *State v. Bias*,

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15. Only two of the seven present members of this court have in the past expressed a different view. In *State v. Eames*, 365 So.2d 1361 (La. 1979). Justice Dennis, with the author of this opinion joining him in a concurrence, was of the view that under Article 1, § 3 of the Louisiana Constitution of 1974, once it has been shown that the prosecutor has used a disproportionate number of challenges or otherwise eliminated a disproportionate number of members of one race as compared to the remaining number in the venire after excuses, exemptions, or removals for cause; then a prima facie case of discrimination has been made out; the burden shifts to the prosecutor to show that the challenges were not made on a racial basis; the prosecutor may sustain this burden by presenting evidence that the challenges were not racially motivated. *Supra* at 1366.

354 So.2d 1330. Admittedly, this case was tried in the same parish where the Brown conviction was in fact reversed because a conscious pattern of exclusion was documented in connection with the particular prosecutor involved. Defendant in this case, however, has not shown that his prosecutor, Premila Chumbley, has exercised the challenges systematically in the past, or that she acted in accord with a long-standing policy of the office.[16]

This assignment of error lacks merit.

ASSIGNMENTS OF ERROR NUMBER NINETEEN AND TWENTY-THREE

[30] By these assignments, the defendant complains that the trial court erred in admitting hearsay evidence, and erred further in denying a motion for mistrial on grounds of a state witness' mention of a polygraph examination.

As set forth above, this case began with the arrest of three other persons for the Todd murder. The state took pains to explain this false state to the jury. Officer Odom thus testified that a statement from Randy Carreca, an employee at the 7-11 store, had triggered the arrests. Asked by the state, over the defense hearsay objection whether Carreca had then changed his story, Odom replied that he had. As a result, the three were released from custody. Officers Gardiner and

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16. For her part, the prosecutor disclaimed any suggestion of bad faith. She explained that "[o]f course, the state [peremptorily] challenged many of the people because it did not feel that they were very strong on the death penalty issue." She added:

> "As your Honor knows, I have been prosecuting in this particular Court for approximately one year and I have taken blacks on my jury, and I would respectfully disagree with the fact that the State had historically and that this particular prosecutor has historically excluded blacks from the jury."

The prosecutor's disclaimer stands unrebutted.

Crouch also over defense objections, confirmed that account.

The defense argues in brief that the officers' account of Carreca's statements was inadmissible hearsay. Carreca later took the stand to testify flatly that defendant was not one of the three persons who emerged from the victim's car outside the 7-11 store. Counsel thus concludes that the admission of the hearsay evidence severely prejudiced the defense, as it tended to impeach the witness before he had a chance to take the stand. LSA-R.S. 15:484.

In *State v. Martin*, 356 So.2d 1370, 1376 (La. 1978), this court adopted Professor McCormick's definition of hearsay as "testimony in court . . . of a statement made out of court, the statement being offered as an assetrion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." As pointed out in *State v. Ford*, 368 So.2d 1074, 1077 (La., 1979), under this definition, "a witness is generally competent to testify that a statement has been made to him [so long as no attempt is also made to vouch for the credibility of its contents]. In that case, the fact of communication turns as much on the credibility of the in-court witness as it does the out-of-court asserter."

For that reason, this court has repeatedly held that in explaining his own actions, a police officer may refer to statements made by other persons involved in the case. As set forth in *State v. Calloway*, 324 So.2d 801, 809 (La., 1976), the statements are "admitted not to prove the truth of the assertion . . . but to explain the sequence of events leading to the arrest of the defendants from the viewpoint of the arresting officers. The testimony [is] therefore not hearsay." See *State v. Monk*,

315 So.2d 727 (La., 1975); *State v. Bluain*, 315 So.2d 749 (La., 1975); and *State v. Carvin*, 308 So.2d 757 (La., 1975).

In this case, the officers' testimony was therefore proper as an explanation of how (at least in the state's theory), the investigation, initially deflected, got back on track.

It was in Officer Crouch's confirmation of the release of the Felton trio that he went on to volunteer that the release turned on "[t]he evidence that we found later, plus through the investigation, polygraph test . . ." Counsel immediately demanded a mistrial for the polygraph remark. The trial court denied the motion; but at counsel's request, admonished the jury the "[e]vidence of any polygraphs are not admissible in a court of law. You should disregard any mention of any polygraphs and you should not speculate on the fact of who may have taken it and who may not have taken any polygraphs in this matter."

[31, 32] The trial court's admonition to the jury was entirely correct. La.C.Cr.P. art. 771. The results of a polygraph test are inadmissible in a criminal trial. *State v. Governor*, 331 So.2d 443 (La., 1976); *State v. Refuge*, 270 So.2d 842 (La., 1974). The willingness or unwillingness of a person to take the test is similarly inadmissible. *State v. Davis*, 351 So.2d 771 (La., 1977). Since the remark did not unambiguously point to the defendant, it did not call for a mistrial under La.C.Cr.P. art. 770. See e.g., *State v. Titus*, 358 So.2d 912 (La., 1978). Likewise, the unresponsive remark did not point unambiguously to any of the other suspects in the case. The defendant was not prejudiced. *State v. Weeks*, 345 So.2d 26 (La., 1977). Compare *State v. Davis*, 351 So.2d 771 (La., 1977).

These assignments of error lack merit.

ASSIGMENTS OF ERROR NUMBER TWENTY AND TWENTY-FOUR

Defense counsel contends that the trial court erred in allowing certain photographs into evidence. It is his assertion that the probative value of these pictures was outweighed by their prejudicial effects. *State v. Kelly*, 362 So.2d 1071 (La., 1978).

[33-35] Photographs of the victim's body are generally relevant to prove corpus delicti; to corroborate other evidence of the manner in which death occurred; to establish the location, severity and number of wounds; to establish the identity of the victim. *State v. Manieri*, 378 So.2d 931 (La., 1979); *State v. Cooper*, 334 So.2d 211 (La., 1976). The fact that the photographs may be gruesome does not in and of itself render them inadmissible. *State v. Beach*, 320 So.2d 142 (La., 1975); *State v. Curry*, 292 So.2d 212 (La., 1974). The defense argues that its offer to stipulate to the identity of the victim and the nature of the death, together with testimony of Dr. Massey, of investigating officers and of the photographer rendered the admission of the photographs cumulative rather than probative. However, the admissibility of photographs is primarily a question reserved to judicial discretion. *State v. Rester*, 309 So.2d 321 (La., 1975); *State v. Harvey*, 358 So.2d 1224 (La., 1978); *State v. Gilmore*, 332 So.2d 789 (La., 1976). Not all photographs tendered by the state were admitted. In viewing those that were, this court is of the opinion that the trial judge did not abuse his discretion.

These assignments of error lack merit.

ASSIGNMENT OF ERROR NUMBER TWENTY-FIVE

By this assignment, the defense asserts that the trial court erred in failing to bar the state's star witness from testifying.

Trial began on September 5, 1978. On September 11, 1978, Michael Sheppard appeared as a witness for the prosecution and recounted the details of the slaying of Ms. Todd. The deal for his testimony had been confected on September 10, the day before he testified. The defense objected to his testimony on the grounds that the state had not given notice of Sheppard's appearance in its opening statement. Counsel relied on La.C.Cr.P. art. 769 which provides that "[e]vidence not fairly within the scope of the opening statement of the state shall not be admitted in evidence."

[36] La.C.Cr.P. art. 766 requires the state to set forth its theory of the case only in "general terms" in the opening statement. It is not necessary that the state detail every shred of evidence in an opening statement. It is sufficient for the state to give a general description of the evidence it plans to introduce. *State v. Berain,* 360 So.2d 822 (La., 1978). The state need not name all of its witnesses in the opening statement; it need not name the co-perpetrators it intends to call at trial. *State v. Square,* 257 La. 743, 244 So.2d 200 (1971).

[37] In his opening statement, the prosecutor set forth in detail what the state intended to prove in the case: that defendant actively participated in the killing of Ms. Todd and in the escape from the crime scene in her car. La.C.Cr.P. art. 769 allows the court to admit evidence which the prosecutor inadvertently and in good faith omits from his opening statement. The testimony of Michael Sheppard clearly falls within the scope of the evidence outlined in the opening statement. The omission of this witness from the opening statement cannot be classified as purposeful or in bad faith when the witness did not agree to testify until five days after the beginning of trial. The prosecutor could not have included reference to Michael Sheppard in the opening statement.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NUMBER TWENTY-SIX

With this assignment, defendant argues that the trial judge improperly admitted evidence of other crimes attributable to him.

In the account of Michael Sheppard, defendant had proposed the entire affair: Edwards and Kent had arrived at Sheppard's house, defendant suggesting "let's go make a hit . . . over there at this lady's house . . ." The plan got off to a ragged start. The trio went first to a grocery store where defendant stole some wine. The three then went looking for a car so that they could go to the lady's house to steal her car. Two attempts at theft failed and the trio returned to Kent's house. Ultimately, the group made its way to the victim's residence on foot.

After the killing, the three sped away from the scene with defendant at the wheel of the victim's car. As the robbery coincident with the murder had netted only a few "old bitty coins in a box," defendant suggested another "hustle". Defendant, still driving the victim's car, followed another woman to the LSU campus where he instructed Sheppard to snatch her purse. The potential victim saw Sheppard coming and he abandoned the plan. Still looking for another "hustle", defendant eventually parked across the street from the 7-11 where Officer Odom's appearance terminated the night's activities.

At each mention of the other offenses detailed in Sheppard's account, defense counsel objected and renewed initial demands for a mistrial. In defendant's view, the other crimes evidence was inadmissible under *State v. Prieur*, 277 So.2d 126 (La., 1973); and La.R.S. 15:445 and 446, and highly prejudicial to the defendant.

Prieur, however, recognized the res gestae exception of La.R.S. 15:447 to the inadmissibility of evidence of other crimes. The statute defines res gestae as "events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants . . ." La.R.S. 15:447. La. R.S. 15:448 provides: "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

[38] The murder of Ms. Todd did not occur in a vacuum. As Michael Sheppard related, defendant suggested the criminal activity which culminated with the death of the victim. The theft of the victim's car can hardly be said to be unrelated to her death. Using the victim's car, defendant and his cohorts continued their night of criminal activity. The sequence of events did indeed form "one continuous transaction" with the crime for which defendant was being tried and therefore were properly admitted under the res gestae exception to the prohibition against the introduction of other crimes evidence. As this court remarked in *State v. Curry*, 325 So.2d 598, 602 (La., 1976), "[w]ithout [such] evidence, the complete story of the crime [could] not be told."

The trial judge did not err in allowing Michael Sheppard to detail fully the criminal activity in which defendant engaged on the night on which the murder was committed.

The assignment is without merit.

DECREE

For the foregoing reasons, defendant's conviction and sentence are affirmed.

DENNIS, J., concurs with reasons.

DENNIS, Justice, concurring.

I respectfully concur.

Although it is not free from doubt, the defense counsel appears at trial to have challenged the exclusion of black persons from the jury purely on the ground of statistical imbalance, rather than on the ground that the prosecuting attorney exercised her peremptory challenges on the basis of race.

APPENDIX B

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 133

FROM: CLERK OF SUPREME COURT OF LOUISIANA
On the 14th day of December, 1981, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justice Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

80-KA-2931 State v. John J. Storms, III

64,204 State v. Donald Edwards

* * *

APPENDIX C

STATE of Louisiana, Appellee,

v.

Donald J. EDWARDS, Appellant.

No. 64204.

Supreme Court of Louisiana.

Oct. 8, 1979

Appeal was taken from the Nineteenth Judicial District Court, East Baton Rouge Parish, Frank Foil, J. The Supreme Court held that: (1) even if anonymous informants are shown to have furnished reliable information in the past, in order to justify a detention or seizure based on information furnished by them the State must nevertheless show that the informant's information was based on his personal observation or knowledge of sufficient factual detail so as to indicate factual reasons for probable cause for the arrest; (2) trial court erred in depriving defendant of an opportunity to demonstrate whether his arrest was made without probable cause; and (3) proper procedure was to remand for a reopening of the pretrial suppression motion.

Remanded for further proceedings.

Dixon, J., dissented with reasons.

Calogero, J., dissented for reasons assigned by Dixon, J.

Dennis, J., dissented and assigns reasons.

PER CURIAM.

In our review of this conviction, we find that a substantial issue is presented by the defendant's motion to suppress his confession. One ground alleged is that the confession

should be suppressed as the product of a warrantless arrest without probable cause. *Dunaway v. New York*, — U.S. —, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). See Assignments of Error Nos. 2, 3 (see also Assignments 4, 5, 6, 21, and 22).

(1)

The defendant Edwards and two alleged accomplices (Kent and Shepherd) were arrested without warrants on the basis of information furnished Lieutenant Gill, an investigating police officer. The defendant Edwards confessed within thirty minutes of the start of the interrogation. If there was no probable cause for the arrest of Edwards and his two alleged companions, a serious issue is presented as to whether, under *Dunaway* and *Brown*, the confession of Edwards should be suppressed as the product of an illegal arrest.

Lieutenant Gill testified that he arrested Edwards and his two alleged accomplices (Kent and Shepherd) on the basis of information obtained from two unidentified informants. One of the informants had previously given him information which had led to at least two arrests and convictions. The other informant had furnished Gill information only on the present occasion. The information had been received by Gill on the day previous to the arrests, and he further testified that these informants had not furnished the information which had led to the earlier arrest of three other suspects.

(2)

The serious error in the pre-trial hearing occurred when the defendant Edwards' counsel attempted to ascertain whether there was probable cause for his arrest.

[1] As this court has held, conformably to *Brown v. Illinois*, cited above, a confession must be suppressed if the product of an illegal arrest made without probable cause. *State v. Scott*, 355 So.2d 231 (La. 1977). We there reiterated, 355 So.2d 234, "A warrantless arrest, no less than an arrest pursuant to a validly issued warrant, must be based on probable cause. . . . Probable cause exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. . . . While the officer need not have sufficient proof to convict, mere suspicion is not enough to justify an arrest."

[2] Thus, even if anonymous informants are shown to have furnished reliable information in the past in order to justify a detention or seizure based upon information furnished by them the state must nevertheless show that the informant's information was based on his personal observation or knowledge or sufficient factual detail so as to indicate factual reasons for probable cause for the arrest. *State vs. Tassin*, 343 So.2d 681, 689 (La. 1977) and decisions therein cited.

[3] "Generalized underworld gossip by faceless informers does not provide a sufficient factual basis" to justify the state's invasion of the security of person and property of individuals living under Louisiana law and guaranteed by Article 1, Section 5 of our state constitution. *Tassin* at 343 So.2d 691. A lead or tip of this non-factual nature does not furnish probable cause for an arrest; consequently, a confession may be inadmissible if it is the immediate product (as the exploitation of) of an illegal arrest thereby resulting. *Dunaway v. New York*, — U.S. —, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

Error in the pre-trial hearing on the motion to suppress resulted when the trial court sustained state objections to defense efforts to establish whether the informants had seen something or heard someone say it or give information as to physical evidence. The defense counsel asked: ". . . what exactly was the information that you received from your informants . . . how did they know they [the defendant and his companions] were involved? Did they hear some talk?" Tr. 148-49, transcript of motion to suppress hearing.

The defense counsel was thus attempting to ascertain the factual basis of the information received by the police officer, by reason of which he believed he had probable cause to arrest the defendant.

The state objected, on the grounds that they were getting into hearsay. However, the defense specifically stated the relevant reason for the query: "The issue is probable cause for the arrest." Tr. 149. See also Tr. 134-36.

The trial court sustained the objection. It had similarly sustained earlier objections attempting to ascertain whether there was probable cause for the arrest. Then, the trial court previously had accepted state arguments that, unlike in a search warrant situation, the basis or reliability of the information leading to the arrest is irrelevant,[1] especially if after the arrest the accused received *Miranda* warnings.

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1. See Tr. 140, prosecutor's argument: "What we're talking about is tips, the police do this constantly. They get tips; they get information off the streets. It didn't stop there. They made arrests on the basis of the two other individuals and their statements which incriminated this particular defendant on the basis of all this sum total of the information." But (see part (3) of this opinion), the state objected to introduction of booking sheets introduced to show that statements of the coaccuseds could not have furnished probable cause for the defendant's arrest because of the short time sequence between the respective arrests.

However, on June 5, 1979, subsequent to the trial court's rulings, the United States Supreme Court in *Dunaway v. New York*, cited above, specifically rejected such arguments. It there held that a confession was inadmissible under the Fourth and Fourteenth Amendments of the United States Constitution, even though received after *Miranda* warnings, because it resulted from the constitutionally impermissible exploitation of a warrantless arrest without probable cause (i.e., one based solely on generalized tips or leads, which did not furnish an articulated factual basis to indicate probable cause for detention of the accused as a suspect for the crime under investigation). As in the present case, in *Dunaway* the first incriminating statements were made within an hour of the accused's detention.

[4] Under *Dunaway*, the trial court was in error in sustaining the state's objections and in depriving the accused of an opportunity to demonstrate whether his arrest was made without probable cause. See also *State v. Scott*, 355 So.2d 231 (La. 1978) and *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), which the defendant's counsel had strenuously (and correctly) urged as justifying his inquiry into the probable cause for the accused's arrest, a relevant query in the determination of whether the confession should be suppressed as the product of an illegal arrest.

(3)

The prior confession of at least one of the defendant's companions may, as the state suggests, also have furnished part of the probable cause for the defendant's arrest. However, if these arrests were likewise made without probable cause (and the companions' confessions secured shortly thereafter), at least some members of the court of the opinion that *Dunaway* and *Brown* dictate inadmissibility not only of their

own confessions but also (insofar as the defendant's arrest may have been based thereupon) of the defendant's confession immediately after his own arrest having been made within or about an hour after the confederate's confessions procured as the result of similar illegal arrests.

In this regard, the defendant attempted to introduce in evidence a certified copy of the booking records of himself and his alleged accomplices (Shepherd and Kent) and to produce other evidence, in order to demonstrate that their arrests were also made without probable cause and that, from the times of the respective arrests, it would be impossible for the confession of Kent to have furnished probable cause for the almost contemporaneous arrest of Edwards. See Tr. 118-129, Motion to Suppres Hearing.

The state objected on grounds of relevancy. The court erroneously sustained this objection for the reasons previously decided. Also, the information was obviously relevant, as is shown by the state's argument seeking to justify the defendant Edwards' arrest as based on information acquired from Kent and Shepherd after their arrests. See footnote 1 above.

(4)

[5] Normally, reversal is required when trial error permits a jury to be exposed to an incriminating statement by the defendant, when that statement might not be admissible, if inquiry had been permitted which was curtailed by the erroneous trial ruling. *State v. McGraw*, 366 So.2d 1278, 1289-90 (La. 1979).

[6] Nevertheless, when the error has occurred in a ruling during a hearing on a *pre-trial* motion to suppress a confession, our recent practice has been to remand the motion for

a reopened hearing to admit the omitted or improperly excluded evidence. *State v. Scott*, 355 So.2d 231 (La. 1978); *State v. Hills*, 354 So.2d 186 (La. 1977); *State v. Simmons*, 328 So.2d 149 (La. 1976). As we explained in *Simmons*, 328 So.2d 153, by this practice "the error might be eliminated upon another trial of the motion to suppress," and a new trial on the merits be avoided if in fact no error at such trial has occurred.

(5)

[7] We find to be here appropriate this procedure of remand for a re-opened hearing on the motion to suppress. Accordingly, we remand the motion to suppress for the trial court to receive at the re-opened hearing evidence as to probable cause for the arrest of the accused, in accordance with the views expressed above, and for it to make its ruling on the motion in the light thereof and of evidence previously received, consistent with the holdings in *State v. Scott*, *Dunaway v. New York*, and *Brown v. Illinois*, cited above.

Because we have not completed our review of other substantial contentions raised by this appeal, we otherwise retain jurisdiction of this appeal, with the following directions: if the trial court finds that the confession should have been suppressed, it is directed to grant the defendant's motion for a new trial (and the present appeal will be mooted); if, on the other hand, the trial court reinstates its denial of the motion to suppress the confession, it is ordered to transmit to this court its ruling and the record of the re-opened hearing on the motion to suppress, in order that this court may complete its review of the issue under the assignments of error previously made and any further ones made as a result of rulings at the re-opened hearing—as well as for us to com-

plete our review of the remaining assignments of error raised by this appeal.

Decree

Accordingly, the motions to suppress the confession are remanded to the trial court for further proceedings in accordance with the views and directions expressed by this opinion. In accordance with and subject to the directions expressed by part (5) of this opinion, this court otherwise retains jurisdiction of this appeal.

DIXON, J., dissents with reasons.

CALOGERO, J., dissents for reasons assigned by DIXON, J.

DENNIS, J., dissents and assigns reasons.

DIXON, Justice (dissenting).

I respectfully dissent from the decision of the majority to remand this matter to the trial court to patch up the evidence adduced in the trial court to support the admissibility of the confession.

Donald J. Edwards was indicted, tried and convicted of first degree murder and was sentenced to life imprisonment on October 12, 1978 after a sentencing hearing.

Seventy-eight year old Ruth McInnis Todd was murdered on January 17, 1978 in her home, supposedly by three persons who broke in at night, ransacked the house, brutally cut and stabbed her to death and fled in her car with a box of coins.

Later that night the police noted the stolen yellow Rambler, parked at an abandoned service station ,occupied by three

suspicious black persons. Their check into the car registration led to the discovery of the crime and the arrest of three suspects. These were later released.

The investigation into the murder continued; three other persons were arrested, interrogated and released in the following week. The homicide division sought lists of possible suspects from other officers and from the Auto Theft Bureau and the burglary division—lists of names of "anyone living in the area who might possibly have been involved, is capable of committing such a crime . . ." Defendant's name appeared on "several" lists.

Six days after the crime the seventeen year old defendant was arrested, without a warrant, in the home of his parents, where he lived.

The day before defendant was arrested Lieutenant Gill had obtained the names of Kent, Shepherd and defendant Edwards from informants whose names were never disclosed. Gill had one telephone conversation with one informant, whom he had not previously known, and perhaps three phone conversations and a conversation in person with the other informer, who had furnished reliable information before. These two told Gill "who, when and where;" "[t]hey told me who was involved . . ." The State interrupted, objecting to any further examination into the basis of the information. The trial judge erroneously sustained the objection.

There is no evidence of the source or reliability of the informers' report and information, except that they were neither witnesses to nor participants in the crime, nor had they been arrested for it.

When defendant was arrested, the police told his mother

it was for burglary and purse snatching. Later that evening the family learned from the television news that defendant had been arrested for murder.

At 5:28 that afternoon defendant waived his rights to silence and representation. Within thirty minutes after questioning began, he made a statement which his counsel sought to suppress as the fruit of a warrantless arrest made without probable cause.

In addition to the "who, when and where" of the informers, the State argues that statements which it obtained from Kent and Shepherd also contributed to the probable cause for the arrest. It is a boot-strapping argument. The police testimony established that the three names were furnished by two informers the day before they were arrested. This was all the information the police had when they set out to arrest the trio. They went, according to Sergeant Breaux, to the high school to pick up Edwards and Shepherd. Edwards was not there, but the police found him at home. Breaux said Edwards was arrested at about 5:00 p.m. It is clear that the police made two trips to Edwards' house. The first time he was not there; the second time, he was arrested. Edwards was booked at 3:15 p.m.; defense counsel offered to introduce the booking records of Kent, but the court sustained the State's objection. Later, however, in argument, the State seemed to admit that Kent and Edwards were booked together, and at 3:15 p.m. (Records introduced at trial proved that to be true).

It is clear that Kent was questioned first, Shepherd next, and Edwards third. It is equally clear, however, that the determination to arrest all three was formed after the tip from the informers, and before any of the three had given a statement to the police. (The trial judge made no specific finding

on this point, except to observe that, based on all the evidence, the State carried its "burden of proving that [the statement] was made freely and voluntary and not made under the influence of fear and duress.")

Breaux testified that Kent was "brought in for investigation." So were Edwards and Shepherd.

In *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), the Supreme Court held that a confession obtained as a direct result of an arrest made without probable cause should be suppressed. When the defendant challenges the admissibility of a confession on the ground that it was the result of an arrest made without probable cause, the burden of showing admissibility rests on the prosecution. *State v. Scott*, 355 So.2d 231 (La. 1977); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). This affirmative showing must be made either by establishing that probable cause existed to arrest defendant or, if the arrest was unlawful, by showing that the causal connection between arrest and the subsequently obtained confession was so attenuated that the confession could not properly be considered as a fruit of the illegal arrest. *Wong Sun v. U.S.*, supra; *State v. Scott*, supra.

Any lawful arrest, whether warrantless or pursuant to an arrest warrant, must be based on probable cause to believe that the person arrested has committed or is committing an offense. Although the measure of probable cause does not require that the arresting officers have suffiicent proof to convict the accused, the arrest may not be predicated upon mere suspicion. *State v. Randolph*, 337 So.2d 498 (La. 1976).

As noted above, the State cloaked in secrecy the means by which the informants came by their information, and

failed completely to show that this knowledge "was obtained under circumstances or from sources factually indicating its veracity." *State v. Wilson*, 366 So.2d 1328, 1331 (La. 1978), citing *State v. Richards*, 357 So.2d 1128 (La. 1978). This record contains no basis on which "to evaluate and credit the reliability both of the indirect source and of the indirectly-obtained information." *State v. Paciera*, 290 So.2d 681, 686 (La. 1974). See also, *State v. Wilson*, supra, at 1331. And for all that appears on the record, the information was no "more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli v. U.S.*, 393 U.S. 410, 416, 89 S.Ct. 584, 589, 21 L.Ed.2d 637, 644 (1969).

As further noted above, the record does not support the State's argument that Kent's statement provided probable cause for Edwards' arrest, because the decision to arrest all three suspects was formed before either was arrested, and Kent and Edwards were booked at the same time. Nor does this record establish that the causal connection between the illegal arrest and subsequent confession became so "attenuated" that it dissipated the taint of an arrest without probable cause. In discussing the factors to be considered in determining when the connexity becomes so "attenuated" that suppression of a confession resulting from an illegal arrest is not required, the United States Supreme Court in *Brown v. Illinois*, supra, stated:

> "It is entirely possible, of course, as the State her argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.

> They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover v. United States*, 384 U.S. 436, 496-497, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966). While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or 'but for' rule.
>
> The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana*, 406 U.S. 356, 365, 92 S.Ct. 1620, 1626, 32 L.Ed.2d 152 (1972), and particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States*, 371 U.S. at 491, 83 S.Ct. at 419 . . ." 422 U.S. at 603-604, 95 S.Ct. at 2261-2262, 45 L.Ed.2d at 427.

The "temporal proximity of the arrest and the confession" of approximately two hours in defendant's case is just as close as in *Brown*. The testimony introduced in the motion to suppress does not indicate the presence of any significant intervening circumstances, such as an appearance before a magistrate, *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), or consultation with an attorney. The "official misconduct" for which the confession must be excluded is the arrest—the ninth—of Edwards for investigation.

The record is clear in this case. The State should not be

given a further opportunity to clean up the official misconduct by which this confesion was obtained. The ruling of the trial court on the motion to suppress ought to be reversed, and the case ought to be remanded for a new trial.

DENNIS, Justice, dissenting.

I respectfully dissent for the reason assigned by Mr. Justice Dixon.

There also appear to be two other errors requiring full consideration and reversal of the defendant's conviction. The transcript of the competency hearing shows that the trial judge abused his discretion in rejecting the commissioners' recommendation that defendant undergo further testing before the court should finally determine his mental capacity to proceed. The trial court also erred in refusing to quash the jury venire because of systematic exclusion of black jurors which resulted in the defendant, a black youth accused of murdering a 78-year old white woman, being tried by an all-white jury.